Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	
Totality of the Circumstances Test	)	

COMMENTS OF THE ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES

Wade H. Hargrove
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
Raleigh, N.C. 27601
Telephone: (919) 839-0300

Counsel for the ABC Television Affiliates Association and the NBC Television Affiliates

John Feore
COOLEY LLP
1299 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
Telephone: (202) 842-7800

Counsel for the CBS Television Network Affiliates Association and the FBC Television Affiliates Association

December 1, 2015

Table of Contents

Summary

The Affiliates Associations urge the Commission not to change the "totality of the circumstances" test for determining whether parties negotiate retransmission consent in good faith. The totality of the circumstances test is deliberately open-ended, adaptable, and context-specific, allowing the Commission to evaluate the "good faith" of negotiating parties on the unique facts of a particular negotiation. The statutory duty to negotiate "in good faith" does not obligate parties to reach agreement but only to "meet to negotiate retransmission consent" at reasonable times and places, and to engage in those negotiations in "an atmosphere of honesty, purpose and clarity of process."[1] The Commission made clear in adopting its good faith negotiating rules that the requirement is patterned after traditional labor law requirements for good faith negotiation,[2] which obligate employers and employees or their representatives "'to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment'" but do not "'compel either party to agree to a proposal or require the making of a concession.'"[3]

Since the Commission adopted its two-part framework for evaluating negotiating parties' good faith in 2000, the "totality of the circumstances" test has functioned, and continues to function, effectively and efficiently, as Congress and the Commission intended, to ensure that market participants come to the negotiating table to determine the terms and conditions under

---

[1] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5455, ¶ 24 (2000) ("*Good Faith Order*").

[2] *See Good Faith Order*, 15 FCC Rcd at 5454, ¶ 22 ("the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance" as to the meaning of the good faith negotiation requirement of Section 325).

[3] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 22 (quoting National Labor Relations Act § 8(d), 29 U.S.C. § 158(d)).

which broadcast stations will consent to the retransmission of their signals by MVPDs "in good faith"—that is, with a "sincere desire to reach an agreement that is acceptable to both parties."[4]

That the Commission's flexible "totality of the circumstances" test is working is best evidenced by the tens of thousands of retransmission consent agreements that have been negotiated successfully, enabling MVPDs of all types and sizes, in markets large and small, to deliver highly-valued local broadcast programming to their subscribers, with few negotiations leading to "showdowns" and even fewer leading to disruptions of service. In fact, the vast majority—more than 99 percent—of retransmission consent negotiations conclude in an agreement without a dispute of any kind, let alone without an impasse that results in a service disruption. And, tellingly, *the Commission has never found a single broadcast station to have engaged in bad faith retransmission consent negotiations*.

When it enacted the retransmission consent requirement, Congress made clear that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the Commission to "dictate the outcome of the ensuing marketplace negotiations."[5] As the Senate Report makes clear, the substantive terms and conditions of retransmission consent agreements should be the product of arm's-length, private market negotiation, not government regulation. The Commission's *limited* role in the retransmission consent negotiation process does not extend beyond the assurance of a fair, open, and efficient *process* for private retrans negotiations.

---

[4] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32.

[5] S. Rep. No. 92, 102nd Cong., 1st Sess., at 35-36 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169.

Respecting that limitation, the Commission has never allowed the "totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[6] Despite repeated entreaties by MVPDs over the years to alter or refine the good faith negotiation framework in order to confer a negotiating advantage on cable and satellite providers, the Commission consistently has refused to overstep the limited role envisioned by Congress, recognizing from the outset that:

- The Communications Act does not "contemplate an intrusive role for the Commission with regard to retransmission consent."[7]

- "The Communications Act "does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission."[8]

- "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[9]

- "Section 325(b)(3)(C) was [not] intended to subject retransmission consent negotiation to detailed substantive oversight by the Commission or indeed that there exist objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on. Indeed, in the aggregate, retransmission consent negotiations are the market through which the relative benefits and costs to the broadcaster and MVPD are established. Although some parties earnestly suggest, for example, that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest."[10]

[6] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32.

[7] *Good Faith Order*, 15 FCC Rcd at 5450, ¶ 13.

[8] *Good Faith Order*, 15 FCC Rcd at 5448, ¶ 6.

[9] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23.

[10] *Good Faith Order*, 15 FCC Rcd at 5467, ¶ 53.

Application of these principles puts to rest the proposals listed in the *Notice*,[11] all of which would either inject the Commission into pure regulation of the substantive terms of negotiated agreements or impose process-oriented rules that would unnecessarily and unproductively entangle the Commission in the retransmission consent negotiating process.

Since the introduction in 1994 of "local-into-local" satellite delivery of local broadcast stations and the long-anticipated introduction of competition in multi-channel distribution of local television stations, certain MVPDs have gone to Congress and the Commission, time and time again, in a self-serving effort (euphemistically labeled "retransmission consent reform") to have the government rescue them from competing with each other for the privilege of marking up the price and reselling local broadcast signals to their subscribers at a profit. The Affiliates Associations respectfully urge the Commission to resist the unrelenting and repetitive assault by MVPDs on the good faith negotiation statutory framework and their plea for the Commission to place its regulatory thumb on the scale to their self-serving, competitive advantage.

Certainly, the video marketplace has changed since the Commission's initial adoption of its good faith negotiating rules. But an indisputable constant has been the massive consolidation and growing financial and negotiating leverage of MVPDs, resulting in the emergence of large, multifaceted television distribution and telecommunications companies whose market capitalization, financial resources, and economic clout dwarf that of local television broadcast stations. The *Notice* fails to acknowledge this change or the extent to which local broadcast

[11] *See In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109, ¶ 1 (Sept. 2, 2015) ("*Notice*").

stations compete head-to-head with pay-TV distributors for access to top-rated television programming and national and local advertising dollars.

Equally perplexing, the *Notice* contains no reference to the disparity in carriage fees paid by MVPDs for cable/satellite network programming and retransmission consent fees paid by MVPDs to local broadcast stations for significantly more popular broadcast signals. MVPDs are projected to pay $50.2 billion for programming in 2015.[12] Of that amount, broadcast retransmission consent fees are projected to constitute only 12.5%.[13] Yet, according to the May 2015 *Nielsen Viewing Trends Report*, broadcast television represents a 35% share of the total day viewing audience.[14] The indisputable fact is that local stations are not, as MVPDs would have the Commission believe, charging MVPDs anywhere close to fair market value for the privilege of reselling local broadcast station signals at a profit. The facts belie the constant refrain by a handful of pay-TV companies that local broadcast stations are, somehow, unfairly enriched by the Commission's existing retransmission consent negotiating rules and that these MVPDs need regulatory intervention by the federal government to enable them to buy more cheaply the signals of local broadcast station competitors and resell those signals at an even greater profit.

The *Notice* observes that "retransmission consent fees have steadily grown and are projected to increase further," implying that changes in the good faith negotiating framework to counterbalance broadcast stations' supposedly increased retrans consent leverage might result in

---

[12] *See* SNL Kagan.

[13] *Id*.

[14] *See* May 2015 *Nielsen Viewing Trends Report*. The cited figure is based on the 2013-2014 television season from 09/23/2013 to 09/21/2014, household data, Live+7. Audience share was derived by calculating each source from the overall sum of all sources excluding non-identifiable sources (Nielsen: "All Other Tuning" category of programming).

decreases in retrans fees, supposedly to the ultimate benefit of MVPD subscribers.[15] Of course, as the *Notice* concedes, "MVPDs are not required to pass through any savings derived from lower retransmission consent fees," and "any reductions in those fees thus might not translate to lower consumer prices for video programming services."[16] In fact, the "reforms" suggested in the *Notice* would not benefit subscribers. A reduction in subscriber rates would be ensured only by regulation of MVPD retail rates. Indeed, if the Commission intends to regulate an economic "input"—that is, retransmission consent fees paid by MVPDs—it must regulate the economic "output" as well, if the intent is to benefit viewers, rather than MVPDs. Moreover, Commission regulation of the "wholesale" price of programming raises the obvious question whether—in order to be effective—the Commission must also regulate the cost of "producing" programming—a result that would plainly chill the production of quality content and involve the Commission in a hopeless and endless regulatory quagmire.

The Affiliates Associations recognize and, indeed, support the right of their networks under copyright law to specify certain terms under which their intellectual property may be distributed by an affiliated station, just as each local station has the right under copyright law to determine the terms under which MVPDs may distribute the station's own, locally-produced programming. The retransmission consent requirement clearly does not trump copyright law, and the Commission's limited authority to oversee the retransmission consent negotiation process cannot override the copyright-protected right of programmers to establish the terms under which their intellectual

---

[15] *In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014*, *Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109, ¶ 3 (Sept. 2, 2015) ("*Notice*").

[16] *Notice*, ¶ 3 n.21.

property may be distributed. The right of networks to control the distribution of their programming does not, however, give networks the right, under the Commission's longstanding network rules, to hijack and commandeer the retrans consent rights of their affiliates upon the threat of disaffiliation or less advantageous terms of affiliation.

Finally, it is appropriate to address—and dispose of—the term "blackout." That term is strategically invoked by MVPDs to mischaracterize MVPD service disruptions—indeed, disruptions typically produced by MVPDs themselves. Broadcast stations are never "blacked out." Broadcast signals are always available over the air for *free* and from multiple other competitive MVPDs in the market during a disruption of service by an MVPD. The term "blackout" is a pejorative (and admittedly clever) fictional term manufactured by MVPDs for regulatory advocacy. The Commission should not be misled by its frequent use by MVPDs to camouflage the underlying nature of a retrans negotiating impasse.

In short, as the *Notice* suggests, the "totality of the circumstances" test is "best left as a general provision to capture those actions and behaviors that [the Commission does] not now foresee but that may in particular future cases impede retransmission consent."[17]

* * *

[17] *Notice*, ¶ 8.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	))	MB Docket No. 15-216
	)	
Totality of the Circumstances Test	)	

COMMENTS OF THE
ABC TELEVISION AFFILIATES ASSOCIATION,
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION,
FBC TELEVISION AFFILIATES ASSOCIATION, AND
NBC TELEVISION AFFILIATES

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the "Affiliates Associations")[1] submit these comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") in the above-referenced proceeding, in which the Commission has undertaken a review of the "totality of the circumstances" test for evaluating the extent to which broadcast stations and multichannel video programming distributors ("MVPDs") negotiate retransmission consent in good faith.[2] The *Notice* responds to a congressional directive to the Commission to "commence a rulemaking to review its totality of the circumstances test for good

[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

[2] *See In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109, ¶ 1 (Sept. 2, 2015) ("*Notice*").

faith negotiations."[3] It is important to note at the outset that Congress did not (1) direct the Commission to examine or reconsider the first part of its two-part good faith framework, which specifies negotiating behaviors that constitute bad faith *per se*; (2) recommend any change in the retransmission consent statute, the good faith negotiation requirement, or the foundational principle that the substantive terms of retransmission consent agreements should be the product of private negotiation driven by market forces; (3) set any deadline for the conclusion of this proceeding; or (4) direct the Commission to take any particular action in response to the Commission's "review" of its current "totality of the circumstances" test.

The video marketplace certainly has changed since the Commission's initial adoption of its good faith negotiating rules. But an indisputable constant has been the massive consolidation and growing financial and negotiating leverage of MVPDs, resulting in the emergence of mega, multifaceted television distribution and telecommunications companies whose market capitalization, financial resources, and economic clout dwarf that of local television broadcast stations. The Commission's *Notice*, conspicuously, fails to acknowledge this change or the extent to which local broadcast stations compete head-to-head with MVPDs for access to top-rated television programming. ACC Commissioner John Swofford, commenting on the fact that ESPN outbid all others for college football's Bowl Championship Series in 2008, confirmed the obvious: "You're talking about a situation where we're seeing more and more sporting events go to cable."[4] Local broadcast stations and MVPDs also compete for national and local advertising dollars. As

---

[3] *See* STELA Reauthorization Act of 2014 ("STELAR") Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

[4] Lynn Zinser, "ESPN Outbids Fox Sports and Wins B.C.S. Rights" (Nov. 18, 2008), available at http://www.nytimes.com/2008/11/19/sports/ncaafootball/19bcs.html?_r=0 (last visited Nov. 30, 2015).

noted in an article in last week's *The Wall Street Journal* referencing a Department of Justice investigation of the advertising and sales practices of Comcast:

> The question has more to do with whether Comcast is wielding *outsize influence* when it comes to selling *local* TV advertising on cable, in two main ways: Comcast takes the lead on negotiating with advertisers on behalf of rival pay-TV providers in many markets. Comcast also owns a majority stake in one of the main companies that helps *national* advertisers buy commercial time from cable providers in local markets.[5]

The Affiliates Associations do not know and do not suggest that Comcast has engaged in any unlawful or impermissible activity. But the quoted article notes the extent to which a number of large MVPDs such as AT&T's DIRECTV, CenturyLink, Comcast, RCN, and others are engaged in the "spot" advertising market competing for ads "from local furniture stores to area politicians to national brands" directly in competition with local television stations—yet, inexplicably, the Commission's *Notice* ignores the critical competitive aspect of today's video market and the significant role played by MVPDs. Any rational or meaningful evaluation of retransmission consent bargaining practices must be viewed in context of the vigorous competition between MVPDs and local television stations.

Equally perplexing, the Commission's *Notice* contains no reference to the disparity in carriage fees paid by MVPDs for cable/satellite network programming and retransmission consent fees paid by MVPDs to local broadcast stations for the significantly more popular broadcast signals. MVPDs are projected to pay $50.2 billion for programming in 2015.[6] Of that amount,

---

[5] *See* Shalini Ramachandran and Brett Kendall, "Justice Department Probing Comcast's Role in 'Spot' Cable Ad Sales Market," THE WALL STREET JOURNAL (Nov. 24, 2015), available at http://www.wsj.com/article_email/justice-department-probing-comcasts-role-in-spot-cable-ad-sales-market-1448387515-lMyQjAxMTE1MjIzNDgyMTQxWj?alg=y (last visited Nov. 27, 2015).

[6] *See* SNL Kagan.

broadcast retransmission consent fees are projected to constitute only 12.5%.[7] Yet, according to the May 2015 *Nielsen Viewing Trends Report*, broadcast television represents a 35% share of the total day viewing audience.[8] The indisputable fact is that local stations are not, as MVPDs would have the Commission believe, somehow charging MVPDs more than fair market value for the privilege of marking up the price and reselling broadcast station signals to their subscribers at a profit. The facts belie the constant refrain by a handful of MVPDs that local broadcast stations are, somehow, unfairly enriched by the Commission's existing retransmission consent negotiating rules and that these MVPDs need regulatory intervention to enable them to buy more cheaply the signals of local broadcast station competitors and resell those signals at an even greater profit.

But the Commission is not writing on a blank slate. This is not the first time the Commission has examined the retransmission consent process in general, or the obligation imposed upon broadcasters and MVPDs alike by Section 325 of the Communications Act to negotiate retransmission consent "in good faith,"[9] or the Commission's own "totality of the circumstances" test for determining whether negotiating parties have satisfied the statutory obligation. The duty to negotiate "in good faith" does not obligate parties to reach agreement but only to "meet to negotiate retransmission consent" at reasonable times and places, and to engage

[7] *Id.*

[8] *See* May 2015 *Nielsen Viewing Trends Report*. The cited figure is based on the 2013-2014 television season from 09/23/2013 – 09/21/2014, household data, Live+7. Audience share was derived by calculating each source from the overall sum of all sources excluding non-identifiable sources (Nielsen: "All Other Tuning" category of programming).

[9] 47 U.S.C. § 325(b)(3)(C)(ii)-(iii). The good faith negotiation requirement facilitates a process that implements the core statutory prohibition on retransmission of any broadcast station's signal without "the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

in those negotiations in "an atmosphere of honesty, purpose and clarity of process."[10] The Commission made clear in adopting its good faith negotiating rules that the requirement is patterned after traditional labor law requirements for good faith negotiation,[11] which obligate employers and employees or their representatives "'to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment'" but do not "'compel either party to agree to a proposal or require the making of a concession.'"[12]

The long history of the Commission's good faith negotiation orders and decisions in complaint cases and the fact that the vast majority of retransmission consent negotiations are concluded without any public dispute or service interruption confirms that the existing good faith paradigm is functioning effectively.[13] As the Commission intended and as Congress required, the current good faith bargaining system continues to ensure that market participants engage in retransmission consent negotiations in good faith. The *flexible*, *context-specific* "totality of the

---

[10] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5455, ¶ 24 (2000) ("*Good Faith Order*").

[11] *See Good Faith Order*, 15 FCC Rcd at 5454, ¶ 22 ("the good faith bargaining requirement of Section 8(d) of the Taft-Hartley Act is the most appropriate source of guidance" as to the meaning of the good faith negotiation requirement of Section 325).

[12] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 22 (quoting National Labor Relations Act § 8(d), 29 U.S.C. § 158(d)).

[13] *See, e.g.*, *Good Faith Order*, 15 FCC Rcd 5445; *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10339 ¶ 1 (2005) ("*Reciprocal Bargaining Order*"); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC LEXIS 4976, *11-12, 52 ¶¶ 10, 35 (Sept. 8, 2005) ("*2005 Report to Congress*"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking (rel. Mar. 3, 2011) ("*Retrans Notice*"); *In re EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070, 15082, ¶¶ 28-29 (rel. Aug. 2, 2001).

circumstances" test plays an important role in that system, enabling the Commission to identify the rare situation in which that system fails.

Since the adoption of the good faith negotiation rule in 2000, the Commission has repeatedly emphasized the *limited* role it plays in ensuring a fair, open, and efficient process for facilitating retransmission consent negotiations. Time and time again, over many years and under many different FCC chairmen, the Commission has affirmed that it will not—indeed, cannot by law—dictate the terms of individual retransmission consent agreements. As the Commission

- The Communications Act does not "contemplate an intrusive role for the Commission with regard to retransmission consent."[14]

- "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[15]

- "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[16]

- The Communications Act "does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission."[17]

- "Congress considered and explicitly rejected a comprehensive regime that required the Commission to: 'prohibit…discriminatory practices, understandings, arrangements, and activities, including exclusive contracts for carriage….'"[18]

---

[14] *Good Faith Order*, 15 FCC Rcd at 5450, ¶ 13.

[15] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23.

[16] *Good Faith Order*, 15 FCC Rcd at 5450, ¶ 14.; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3006, ¶ 178 (Mar. 11, 1993) ("*Signal Carriage Order*") (discerning congressional intent that the Commission refrain from directly regulating retransmission consent rates).

[17] *Good Faith Order*, 15 FCC Rcd at 5448, ¶ 6.

[18] *Good Faith Order*, 15 FCC Rcd at 5450-51, ¶ 14 (quoting H.R. 1554, 106th Cong., 1st Sess. (1999) (unenacted Section 325(b)(2)(C)(ii)).

- The Commission never "intend[ed] the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[19]

- "[W]e do not believe, as a general matter, that Section 325(b)(3)(C) was intended to subject retransmission consent negotiation to detailed substantive oversight by the Commission or indeed that there exist objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on. Indeed, in the aggregate, retransmission consent negotiations are the market through which the relative benefits and costs to the broadcaster and MVPD are established. Although some parties earnestly suggest, for example, that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self interest."[20]

- "Congress did not empower the Commission to sit in judgment of the substantive terms and conditions of retransmission consent agreements."[21]

Undeterred, some—although, to be sure, not all—MVPDs have repeatedly implored the Commission to identify particular negotiating behaviors by broadcasters as *per se* examples of bad faith negotiation, or at least as indicators of bad faith under the totality of the circumstances test, and to mandate particular retransmission consent rates, terms, and dispute resolution mechanisms that uniformly favor MVPDs.[22] On every occasion, the Commission has reaffirmed that the retransmission consent marketplace and the good faith negotiation framework are functioning as

[19] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32. *See also id*. at 5448, ¶ 8 (concluding that "it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on").

[20] *Good Faith Order*, 15 FCC Rcd at 5467, ¶ 53.

[21] *Good Faith Order*, 15 FCC Rcd at 5480, ¶ 81.

[22] *See, e.g.*, *In re EchoStar*, 16 FCC Rcd at 15082, ¶¶ 28-29; *ATC Broadband LLC v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (Feb. 18, 2009); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (Mar. 3, 2011); *cf. Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, MB RM-11728 (July 21, 2014).

Congress intended, effectively and efficiently facilitating productive negotiations that have resulted in tens of thousands of agreements enabling MVPDs of all types and sizes, in large and small markets across the country, to deliver broadcast programming, including highly valued local news, sports, weather, public safety, and public affairs programming, to their subscribers.[23]

It is telling that the concerted efforts of MVPDs at regulatory arbitrage, over a multi-year period, to persuade Congress to act on their behalf has produced nothing more than a simple congressional directive to the Commission to "review" *one* part of its two-part good faith negotiation test. Congress directed no substantive changes to the retransmission consent statute or its good faith negotiation requirement—and gave no directive to the Commission to revise its good faith negotiation regulations, recommend any changes to the good faith paradigm, or even report to Congress on the results of its review.

The retransmission consent marketplace continues to function effectively; the Commission's good faith rules continue to promote productive negotiations; and the interests of MVPDs, broadcast stations, and, more importantly, the *public* continue to be served by private marketplace negotiations, rather than by government fiat. No change to the Commission's long-standing, effective, and statutorily restrained "totality of the circumstances" test for good faith negotiation is warranted, including the radical changes proposed by MVPDs and cited by the

[23] *See, e.g.*, *Good Faith Order*, 15 FCC Rcd at 5451, ¶ 15 (noting that "thousands of retransmission consent agreements have been successfully concluded between local broadcasters and MVPDs since adoption of the 1992 Cable Act"); *2005 Report to Congress*, 2005 FCC LEXIS 4976, *68, ¶ 44 ("We believe that, overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals.").

Commission in the *Notice*.[24] The *Notice*, itself, is troubling in that it contains a recitation of virtually every proposal *by MVPDs* to tip the negotiating leverage in their favor.[25] Since the introduction in 1994 of "local-into-local" satellite delivery of local broadcast stations and the long-anticipated introduction of competition in multi-channel distribution of local television stations, certain cable systems and satellite companies have gone to Congress and the Commission, time and time again, in a self-serving effort (euphemistically labeled "retransmission consent reform") to have the government protect them from each other in competing for the privilege of reselling broadcast signals at a profit to their subscribers. The Affiliates Associations respectfully urge the Commission to resist the unrelenting and repetitive assault by MVPDs on the good faith negotiation statutory framework and their plea for the Commission to place its regulatory thumb on the scale to their self-serving, competitive advantage.

For all the reasons discussed herein, the "totality of the circumstances" test should not be modified, expanded, or made more specific.

---

[24] The point is illustrated by the filings in this Docket by the National Association of Broadcasters directed to the "member survey" conducted by NTCA-The Rural Broadband Association and INCOMPAS (formerly known as COMPTEL). *See* Letter from Rick Kaplan, NAB, MB Docket Nos. 10-71, 15-216 (filed Oct. 28, 2015), attaching the survey and noting multiple flaws in the survey methodology, including its blatant anti-broadcaster bias. NTCA and INCOMPAS responded, defending the validity of the survey and sounding pay-TV providers' theme that "difficulties obtaining access to video content"—particularly broadcast content—reflects a marketplace failure and calls out for government intervention. *See* Letter from Jill Canfield, NTCA, and Angie Kronenberg, INCOMAS, MB Docket No. 15-216 (filed Nov. 2, 2015). As NAB pointed out in reply, MVPDs' cries of marketplace failure cannot be reconciled with the pace of successful retransmission consent deals that bring broadcast programming to pay-TV subscribers. *See* Letter from Rick Kaplan, NAB, MB Docket No. 15-216 (filed Nov. 5, 2015), at 2.

[25] *See, e.g.*, *Notice*, ¶ 16 & nn.77-91.

1. **The "totality of the circumstances" test functions as the Commission's 2000 *Good Faith Order* intended and should not be modified, expanded, or made more specific.**

   a. **The virtue of the "totality of the circumstances" test is its flexibility.**

The current proceeding has its roots in the two-part framework the Commission adopted in 2000 to determine whether broadcast stations and MVPDs are negotiating retransmission consent "in good faith."[26] The first component of the test identifies specific, objective negotiating behaviors that are deemed "*per se*" violations of the good faith requirement.[27] The "totality of the circumstances" test—the second component of that framework and the *only* part of the test with which Section 103 of STELAR and the *Notice* are concerned[28]—allows the Commission to consider whether under the "totality of the circumstances"—absent a *per se* violation—the parties have negotiated retransmission consent in good faith.[29] As the Commission has defined it, that test is limited to a determination whether the unique facts of a particular negotiation indicate that a party lacked a "sincere desire to reach an agreement that is acceptable to both parties."[30] The

[26] *See Good Faith Order*, 15 FCC Rcd at 5448, 5457-58, ¶¶ 6, 30-32.

[27] *See Good Faith Order*, 15 FCC Rcd at 5448, 5462-64, ¶¶ 6, 40-46 (reciting seven original *per se* bad faith negotiating behaviors); *Notice* ¶ 2 & n.11 (reciting the nine current *per se* bad faith negotiating behaviors); 47 C.F.R. § 76.65(b)(1).

[28] *See Notice*, ¶ 7 (asking "whether there is a need to update the totality of the circumstances test" in light of the current functioning of the retransmission consent marketplace).

[29] *Good Faith Order*, 15 FCC Rcd at 5448, ¶ 7; *see also* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).").

[30] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32.

limited scope of the "totality of the circumstances" test seems to be lost on MVPDs—but it is critical, in the implementation of Section 103 of STELAR, that it not be lost on the Commission.

The "totality of the circumstances" test, by definition, is fact-specific, adaptable, and inclusive. The virtue of the test is its flexibility: It is a deliberately open-ended, inherently fact-dependent standard for evaluating the myriad and unique circumstances of thousands of complicated retransmission consent negotiations involving thousands of MVPDs and broadcast stations in 210 DMAs across the country. The adaptability and lack of specificity of the test are the very reason it has functioned—and continues to function—so effectively, and with so little regulatory burden on the Commission, the parties, and taxpayers. As it applies today, the totality of the circumstances test performs exactly the role envisioned by Congress and by the Commission in its *Good Faith Order*.

Implicit in the *Notice* is a contrary assumption: that the good faith negotiation rules, and in particular the "totality of the circumstances test," have not functioned to ensure the fair, open, and effective "marketplace" the Communications Act and the Commission envisioned. The *Notice* asks repeatedly whether the "totality of the circumstances" test is flawed, incomplete, imprecise, or otherwise ineffective, and (if so) how the Commission can modify, supplement, enlarge, or replace the test to facilitate retransmission agreements and thereby (among other things) avoid service disruptions that affect viewers.[31] The Affiliates Associations disagree with the underlying predicate of the *Notice* that the "totality of the circumstances" test is not functioning as intended. The facts disprove the predicate.

[31] *See, e.g.*, *Notice*, ¶¶ 7-8.

The good faith negotiation framework, and the totality of the circumstances test in particular, have facilitated the successful negotiation of tens of thousands of retransmission consent agreements in the private marketplace—*without government interference*. These agreements provide MVPDs' subscribers access to a wide variety of broadcast national and local programming, including valuable local news, weather, sports, public safety, public service, public affairs, and emergency programming. Those aggressively-negotiated agreements also ensure local broadcasters that their programming, and the advertisements for local businesses that provide the revenues essential to the continued acquisition and creation of the valuable programming provided by local stations, reach as many viewers as possible. Under the Commission's existing good faith framework, MVPDs and broadcasters have shared incentives to bring retrans negotiations to a successful conclusion,[32] with few negotiations leading to retrans "showdowns" and even fewer leading to a disruption of service.[33] And it is telling that the few negotiation impasses that have led to program disruptions have repeatedly involved the same handful of bad actors: large MVPDs with significant negotiating leverage in all markets.[34]

---

[32] *2005 Report to Congress*, 2005 FCC LEXIS 4976, at *68-69, ¶ 44 (observing that "the retransmission consent process provides incentives for both parties to come to mutually beneficial arrangements" and that "both the broadcaster and MVPD benefit when carriage is arranged" and, "[m]ost importantly, consumers benefit by having access to…programming via an MVPD") (citation and internal quotation marks omitted).

[33] *See Retrans Notice*, ¶ 12 ("There have been very few complaints filed alleging violations of the Commission's good faith rules."); American Television Alliance, Media Center Fact Sheet, "Blackout List 2010-2015," available at http://www.americantelevisionalliance.org/media-center/ (last visited Dec. 1, 2015).

[34] *See* American Television Alliance, Media Center Fact Sheet, "Blackout List 2010-2015." A review of this list reveals that DIRECTV, DISH, and Mediacom Communications have been involved in the vast majority of service disruptions since January 1, 2015.

It is appropriate to address—and dispose of—the term "blackout." That term is strategically invoked by MVPDs to mischaracterize MVPD service disruptions—indeed, disruptions typically produced by MVPDs themselves. Broadcast stations are never "blacked out." Broadcast signals are always available over the air for *free* and from multiple other competitive MVPDs in the market during a disruption of service by an MVPD. The term "blackout" is a pejorative (indeed, clever), fictional term manufactured by MVPDs for regulatory advocacy. The Commission should not be misled by its frequent use by MVPDs to camouflage the underlying nature of a retrans negotiating impasse.

The Commission asks how it can "most effectively address complaints that do not allege *per se* violations but that involve behavior that is asserted to be inconsistent with good faith?"[35] The Commission should continue, as it has historically, to evaluate good faith negotiation complaints by considering the *unique* facts of a retransmission consent negotiation in light of the "*totality of the circumstances*" to answer the simple question whether the party accused of bad faith engaged in negotiations with a "sincere desire to reach an agreement that is acceptable to both parties."[36] The Commission's experience and judgment allow it to determine, on those unique facts, whether the statutory mandate has been satisfied or flouted.

Any effort by the Commission to provide "additional guidance on conduct that will be considered evidence of bad faith under the totality of the circumstances"[37] would not only be unnecessary (because the *per se* component of the good faith test specifies conduct that necessarily

[35] *Notice*, ¶ 7.

[36] *Good Faith Order*, 15 FCC Rcd at 5458, at ¶ 32.

[37] *Notice*, ¶ 7.

evidences bad faith[38]), but affirmatively unhelpful, as the "totality of the circumstances" test is, by design, intended to allow the Commission to measure the good (or bad) faith of parties to retrans consent negotiations *on the facts of each individual negotiation*. The Commission, with limited exceptions, need not and should not identify specific practices as indicative of bad faith negotiation in the abstract; instead, it should continue to resolve good faith complaints case-by-case, on their unique facts and in light of the particular circumstances of each negotiation.[39] Put differently, the answer to the core question posed by the *Notice* is one the *Notice* itself recites: The "totality of the circumstances" test is "best left as a general provision to capture those actions and behaviors that [the Commission does] not now foresee but that may in particular future cases impede retransmission consent."[40]

For much the same reason, the Commission should not modify or expand the lists of bargaining proposals it presumes to be "consistent" or "inconsistent" with competitive marketplace consideration and the good faith negotiation rule.[41] No modification, expansion, or withdrawal is necessary. The litany of bargaining proposals posited by MVPDs and listed by the Commission all remain "presumptively" consistent or inconsistent with competitive marketplace

---

[38] Indeed, if certain objective negotiating behaviors by broadcasters or MVPDs necessarily indicate bad faith, those behaviors would be appropriately identified as *per se* bad faith negotiation practices. Of course, Congress has not directed the Commission to examine the *per se* component of its good faith negotiation framework, nor has it amended the Communications Act in any respect to identify and prohibit particular "bad faith" negotiating practices.

[39] *See Reciprocity Order*, 20 FCC Rcd at 10346, ¶ 15 ("We also agree that identifying additional negotiating proposals that can be considered to reflect a failure to negotiate in good faith under the totality of the circumstances test should be done on a case-by-case basis.") (footnote omitted).

[40] *Notice*, ¶ 8.

[41] *Notice*, ¶ 9.

considerations. There is no need for the Commission to identify additional bargaining proposals that are "presumptively" consistent (or not) with competitive marketplace considerations because the flexibility of the "totality of the circumstances" test can and does take account of marketplace considerations that bear on the multitude of potential bargaining proposals made in the context of thousands of highly individualized retransmission consent negotiations across the country.

b. Because the retransmission consent marketplace continues to be healthy and functioning, no changes to the good faith regime are necessary.

The *Notice* also seeks comment on how the retransmission consent market presently is functioning, whether the totality of the circumstances test has been effective in facilitating retransmission consent negotiations, and whether there is a market failure that should be addressed (through elimination or modification of the test).[42] In the 15 years since the Commission released the ¶the Commission has repeatedly indicated that the "totality of the circumstances" test is adequate to resolve bad faith negotiation complaints—and, in fact, there have been only half a dozen complaints adjudicated by the Commission in the 15 years since the good faith rules were implemented.[43] Both small and large consolidated MVPD companies have ample resources and

[42] *See Notice*, ¶¶ 7, 8.

[43] *See Notice*, ¶ 5 & n.31 (noting that "good faith complaints are generally filed during signal blackouts or the impending threat thereof" and that "most complaints are settled and dismissed before Commission resolution"; citing "the single instance in which the Media Bureau has found a violation of the good faith negotiation requirement"). Specifically, the Commission has found *one MVPD*, Choice Cable T.V., to have violated its obligation to negotiate retransmission consent in good faith, *see Letter to Jorge L. Bauermeister*, 22 FCC Rcd 4933, 4935 (2007), and has rejected good faith complaints filed by other MVPDs, *see Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (rel. Jan. 4, 2007); *ATC Broadband*, 24 FCC Rcd 1645; *In re EchoStar*, 16 FCC Rcd 15070, and by broadcasters, *ACC Licensee, Inc. v. Shentel Telecommunications Co.*, Memorandum Opinion and Order, 27 FCC Rcd 7584 (2012); *Northwest Broadcasting, L.P. v. DIRECTV, LLC*, Memorandum Opinion and Order, MB Docket No. 15-151 (rel. Nov. 6, 2015).

strong financial incentives to file good faith complaints where the facts even arguably warrant them, but the reality is complaints are actually few and far between. The vast majority—more than 99 percent—of retransmission consent negotiations conclude in an agreement without a dispute of any kind, let alone without an impasse that results in a disruption of MVPD service. And, tellingly, *the Commission has never found a single broadcast station to have engaged in bad faith negotiations*.[44]

The Commission need look no further than the large number of successful retransmission consent negotiations and, in contrast, the *de minimis* percentage of failed negotiations that lead to the filing of good faith complaints or disruptions to consumers during an impasse. Commission action plainly is not necessary when the retransmission consent market is healthy, functioning, and facilitating the successful negotiation of retransmission consent agreements, all to the ultimate benefit of the viewing public. Neither the *Notice* nor STELAR identifies any intervening marketplace development warranting a change in the totality of the circumstances test, particularly a change that might impair the ability of broadcast stations to bargain with MVPDs and negotiate retransmission consent agreements free of Commission micromanagement.

2. The Commission should adhere to its longstanding refusal to dictate the substantive terms of individual retrans agreements.

Congress made clear that it enacted the retransmission consent requirement "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the Commission to "dictate the outcome of the ensuing marketplace negotiations."[45] Congress plainly

---

[44] *See Retrans Notice*, ¶ 12.

[45] S. Rep. No. 92, 102nd Cong., 1st Sess., at 35-36 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169 ("Senate Report").

intended the substantive terms and conditions of retrans agreements to be the product of arm's-length, private market negotiation, rather than government regulation. From the outset, the Commission recognized that Congress does not envision the Commission's role in the retransmission consent negotiation process to extend beyond the assurance of a fair, open, and efficient *process* for private retrans negotiations.[46]

In keeping with that premise, the Commission made clear that the "totality of the circumstances" test, and its role in overseeing regulated parties' participation in the retransmission consent negotiation process, is not intended to dictate substantive terms of individual retrans agreements, whether overtly or through the guise of determining whether individual market participants negotiated retransmission consent in good faith.[47] Put differently, the Commission has never "intend[ed] the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[48] For the Commission now to dictate the substantive terms of individual retrans agreements—supposedly by way of refinement to the totality of the circumstances test—would fly in the face of the very foundation of Section 325 and more than a decade of Commission precedent. As the Commission has previously acknowledged,

---

[46] 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65. *See also Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24 ("We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a *process* that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.") (emphasis added).

[47] *In re ACC Licensee*, 27 FCC Rcd at 7587, ¶ 8 (noting that, as a general rule, "disagreement over the rates, terms, and conditions of retransmission consent—even fundamental disagreement—is not indicative of a lack of good faith"); *see also In re Mediacom*, 22 FCC Rcd at 38, ¶ 6 (same).

[48] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32. *See also id.* at 5448, ¶ 8 (concluding that "it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on").

"Congress left the negotiation of retransmission consent to the give and take of the competitive marketplace," not to regulatory interference and second-guessing.[49]

Nevertheless, the *Notice* lists more than a dozen negotiating regulatory proposals identified by MVPDs, which, if adopted, would inject the Commission into retrans rate regulation—either directly or indirectly—which is expressly prohibited by Congress. The *Notice* contains nearly every MVPD request for terms that would provide MVPDs with a regulatory pricing advantage in retransmission consent negotiations. The Commission should refuse in this proceeding, as it has since 2000, to inject itself into the setting of rates, terms, and conditions of retransmission consent agreements.[50]

a. Private marketplace negotiation, not government regulation, should determine the rates, terms, and conditions of retrans consent, including MVPD subscribers' use of devices, MFN provisions, and channel position or tier placement.

The *Notice* posits certain bargaining positions that would foreclose broadcasters from even *proposing* certain rates or terms in the course of retrans negotiations. But as the Commission recognized in 2000,

---

[49] *See Good Faith Order*, 15 FCC Rcd at 5470, ¶ 56 ("[A]bsent conduct that is violative of national policies favoring competition, we believe Congress intended this same give and take to govern retransmission consent.").

[50] The Commission must justify any change in its longstanding refusal to second-guess the substantive terms of privately-negotiated retransmission consent agreements. *See, e.g.*, *Verizon Telephone Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) ("If the FCC changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed") (quoting *Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983)); *Monroe Commc'ns Corp. v. FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990) (Commission must "supply a reasoned analysis explaining [a] departure from its prior policies and standards"); *cf. FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1824 (2009) (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

> to arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.[51]

Adoption of the proposals in the *Notice* would withdraw that "latitude." None of those proposals are sound as a legal, policy, or practical matter.

The *Notice* asks whether the Commission should prohibit all (or certain) most-favored-nation ("MFN") provisions in retrans agreements. MFN provisions are substantive terms that appear in various program carriage agreements and are widely used—both by MVPDs and broadcast stations—in retransmission consent agreements. Indeed, member stations of the Affiliates Associations report that MFNs, if anything, may be used more frequently and extensively by MVPDs, especially satellite carriers, than by broadcasters. Broadcast stations and MVPDs alike should remain free to negotiate MFN provisions that are consistent with "competitive marketplace considerations." As with the other proposals (derived from MVPDs' wish-list of favorable retrans rules), it has not been and should not be the Commission's role to dictate the rates or other substantive terms and conditions of retrans agreements.

For the same reasons, the Commission should not regulate the ability of stations to prohibit the use of lawful devices and functionalities by an MVPD or furnished by the MVPD to its subscribers. Parties should remain free to negotiate the parameters of MVPD subscribers' use of devices to view retransmitted signals, just as they propose, negotiate, and often compromise on other substantive terms of their retransmission consent agreements. Broadcast stations, as noted earlier, directly compete with MVPDs and have market incentives to negotiate for restrictions on

---

[51] *Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56.

the use by MVPDs of devices and functionalities (such as the "ad hopper") that would limit the effectiveness of broadcast advertisements, given that advertising revenues remain the lifeblood of *free*, over-the-air broadcasting. Moreover, under the terms of their program license and commercial advertising agreements, broadcast stations may be precluded from authorizing the retransmission of their signals by MVPDs that use certain devices. As shown earlier, MVPDs compete directly with broadcast stations for advertising revenue and, clearly, have a competitive incentive to deploy anticompetitive devices against competitive broadcast stations.[52] Again using "ad-hopper" as an example, a rule *forbidding* broadcast stations from negotiating a prohibition on "new devices and functionalities" would amount to a government-granted, unfair, and anticompetitive commercial advantage to MVPDs. Parties should be left to negotiate at arm's length to determine the role of MVPD devices and functionalities.

Finally, channel placement and tier position plainly are proper subjects for arm's-length negotiation. In fact, provisions for channel placement and tier position are common substantive terms in *all* program carriage agreements, not only retransmission consent agreements. The Commission should reject the MVPD-driven proposal to prohibit television stations from insisting on channel position(s) or tier placement as a condition of carriage. Both channel position and tier placement are elements of the value proposition for stations in any retransmission consent negotiation: "Network affiliates typically market themselves based on their broadcast network

[52] Using "ad hopper" to illustrate the issue raises a separate point: New devices and functionalities cannot be determined to be "lawful" until their legality is tested in litigation. DISH's "ad hopper" has been the subject of protracted copyright litigation with broadcasters. *See Fox Broadcasting Co., Inc. v. DISH Network LLC*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012); *aff'd*, 723 F.3d 1067 (9th Cir. 2013); *on remand*, No. CV12-04529 DMG, 2015 U.S. Dist. LEXIS 54763 (C.D. Cal. Jan. 20, 2015).

affiliation and channel position (*e.g.*, FOX 5)."[53] Channel position(s) and tier placement also assure a consistent and logical arrangement of network-affiliated stations in proximity to other stations offering programming of similar quality and provide predictability and ease of access to viewers. It is an important financial component of the bargain.

As they have been since 2000, broadcast stations should remain free to negotiate the terms and conditions, including the channel position(s), on which they will consent to retransmission of their signal based on prevailing marketplace conditions, without substantive constraint imposed by the Commission.[54] Broadcasters should not find their hands tied by regulation that inherently tilts the marketplace in favor of MVPDs.

b. The Commission should not attempt to regulate retransmission consent rates or the methodology parties agree to use to calculate them.

The rate (or other form of compensation), computation, timing of payment, and other provisions related to consideration paid by MVPDs to broadcasters for the right to retransmit their signals lie at the heart of retransmission consent negotiations. It is not the Commission's role, nor is the Commission equipped, to micromanage private-market retrans negotiations—which would be precisely the result of rules that would consider variances in the form or amount of compensation as indicia of bad faith under the totality of the circumstances test.[55]

---

[53] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Annual Report, 30 FCC Rcd 3253, 3334, ¶ 180 (Apr. 2, 2015).

[54] *See Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56 (finding "carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights" presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement).

[55] *See Signal Carriage Order*, 8 FCC Rcd at 3006, ¶ 178 ("Congress did not intend that retransmission consent rates be directly regulated.").

The Commission should, accordingly, reject MVPD calls for a rule that flatly prohibits broadcast stations from "discriminating" among MVPDs in the same market in retransmission consent rates and conditions.[56] Congress has declared that "it *shall not be a failure to negotiate in good faith* if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[57]

Mindful of that congressional directive, the Commission has long maintained that its role is to ensure a fair and efficient negotiation process but emphatically not to dictate the substantive terms of individual retrans agreements—particularly the *rates*. That the resulting terms and conditions of arm's-length negotiations will not always be identical between and among all stations or all MVPDs in a single market, however, is an express expectation of Section 325: Differences in rates, terms, and conditions are allowable, as long as those differences are based on "competitive marketplace considerations."[58] Stations should remain free to negotiate different rates and other terms with MVPDs, so long as the (varying) terms are consistent with "competitive marketplace considerations." The "uniform pricing" rule some MVPDs prefer is thinly veiled rate regulation and would expand the Commission's involvement in the minutiae of retransmission consent negotiations well beyond the limited authority conferred on the Commission by Congress. It

[56] *Notice*, ¶ 16(xiii).

[57] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added); *see also* 47 C.F.R. § 76.65(a)(1) (declaring that "it shall not be a failure to negotiate in good faith if…The television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.").

[58] 47 U.S.C. § 325(b)(3)(C).

would essentially mandate that stations charge all MVPDs the rates negotiated by the largest MVPD in each market, regardless of an individual MVPD's subscriber base, the breadth of its distribution system (that is, volume discounts), or other value it agrees to provide the station such as carriage of multicast channels or purchase of advertising. That is not how free markets are supposed to work.

Such substantive oversight of the price terms of individual retrans agreements also would far exceed the Commission's capabilities: The *Notice* offers no suggestion as to how the Commission might determine whether "direct and legitimate economic benefits" are, in fact, associated with a difference in price terms among retrans agreements with individual MVPDs in a single market.[59]

The *Notice* observes that "retransmission consent fees have steadily grown and are projected to increase further," implying that changes in the good faith negotiating framework to counterbalance broadcast stations' supposedly increased retrans leverage might result in decreases in retrans fees, supposedly to the ultimate benefit of MVPD subscribers.[60] Of course, as the *Notice* concedes, "MVPDs are not required to pass through any savings derived from lower retransmission consent fees" and "any reductions in those fees thus might not translate to lower consumer prices for video programming services."[61] In fact, the "reforms" suggested in the *Notice* would not benefit subscribers. As the National Association of Broadcasters has explained

---

[59] *Notice*, ¶ 16(xiii).

[60] *Notice*, ¶ 3.

[61] *Notice*, ¶ 3 n.21.

previously, "only regulation of MVPD retail rates would ensure a reduction in subscriber rates."[62] Indeed, if the Commission intends to regulate an economic "input"—that is, retransmission consent fees paid by MVPDs—it must regulate the economic "output" as well, if the intent is to benefit viewers, rather than MVPDs. Moreover, Commission regulation of the "wholesale" price of programming raises the obvious question whether—in order to be effective—the Commission must also regulate the cost of "producing" programming—a result that would plainly chill the production of quality content and involve the Commission in a hopeless and endless regulatory quagmire.

For similar reasons, the Commission should not prohibit broadcast stations from negotiating for payment based on signals viewed by an MVPD's subscribers through the MVPD's internet offering, rather than by means of the MVPD's traditional video service.[63] Just as with other substantive terms of a retransmission consent agreement, the definition of those "subscribers" on the basis of which retrans fees are determined should be left to the parties to negotiate at arm's length.

Relatedly, the Commission asks whether an MVPD that is affiliated with a broadcast station should be allowed to discriminate among other MVPDs in rates, terms, and conditions of retransmission of the station.[64] Indeed, MVPD-affiliated broadcast stations and MVPD-affiliated

---

[62] Opposition of the National Association of Broadcasters, MB Docket No. 10-71 (May 27, 2011) at 42 ("NAB Retrans Opposition"); *see also id*. at 47 (citing General Accounting Office reports that have "linked higher cable rates to a lack of competition in the MVPD marketplace, rather than retransmission consent fees").

[63] *Notice*, ¶ 16(iv).

[64] *Notice*, ¶ 16(vii) & n.84 (considering a rule prohibiting "an MVPD-affiliated broadcaster's" discrimination in the terms and conditions of retransmission consent "among or between MVPDs based on vertical competitive effects" and assuming, in a footnote, that the

broadcast networks pose special concerns and warrant special regulatory oversight to assure fairness and a competitive marketplace. MVPDs that own or control local broadcast stations or broadcast networks should not be permitted to discriminate against stations that are not owned or controlled or affiliated with the MVPD. Discrimination by such an MVPD that is not based on "competitive marketplace considerations" should, indeed, constitute a *per se* violation of the good faith negotiating rules. As the Commission has previously recognized, broadcast-affiliated MVPDs should not be permitted to exploit the retransmission consent process to secure an unfair marketplace advantage, an outcome antithetical to the fundamental assumption underlying the retransmission consent regime that parties must negotiate *at arm's length* based on competitive marketplace conditions.[65] This was the conclusion reached by the Commission, and supported by network-affiliated stations, in the Comcast/NBC transaction. Certain safeguards were imposed by the Commission in that transaction to protect against potential abuse.[66]

c. The Commission should reject MVPD calls for regulation of bargained-for exclusivity provisions that prohibit importation of duplicating signals beyond those exceptions enacted by Congress.

As a condition of consent to retransmission of their signals, broadcast stations must remain free to prohibit an MVPD from importing a duplicating distant station (even if the local station is

---

MVPD proposing the rule means to refer to "a broadcaster's offering more favorable terms and conditions of retransmission consent to an MVPD with which it is vertically integrated").

[65] *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order ("*Comcast Order*"), ¶ 34 (rel. Jan. 20, 2011) ("Congress and the Commission have long been concerned about the possibility that an integrated video firm may exploit its ability to exclude its distribution rivals from access to its programming, or raise programming prices to harm competition in video distribution.") (footnote omitted).

[66] *See Comcast Order*, ¶¶ 34-48.

not retransmitted by the MVPD) unless the duplicating station is "significantly viewed," the sole exception to the exclusivity rules recently enacted by STELAR.[67] In light of the unambiguous statutory language, proposals by MVPDs for a regulatory prohibition on broadcast stations negotiating for (and MVPDs agreeing to) a restriction on the importation of out-of-market, non-significantly-viewed signals must be rejected. Beyond the constraint imposed by STELAR, Section 325 plainly anticipates that the terms and conditions of—including restrictions upon—retransmission of a station's signal are to be dictated by private negotiation, not Commission regulation. The Commission's *limited* oversight authority with respect to the good faith negotiation *process* simply cannot be stretched to permit regulatory micromanagement of privately-bargained-for contractual exclusivity rights. If the Commission by regulation effectively prohibits local stations from enforcing their contractual exclusivity rights, leaving MVPDs free to import out-of-market duplicating signals at the first sign of a retrans dispute, the result will be an unfair and unwarranted regulatory advantage for MVPDs and the rapid demise of free, over-the-air television service.[68]

---

[67] *See* 47 C.F.R. § 76.92(f); STELAR § 103(b) (amending 47 U.S.C. § 325(b)(3)(C) to "prohibit a television broadcast station from limiting the ability of a[n MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . unless such stations are directly or indirectly under common de jure control permitted by the Commission.").

[68] Broadcasters and program suppliers alike have pointed out in the Commission's ongoing proceeding examining the network non-duplication and syndicated exclusivity rules that those rules are an essential component of the closely-intertwined copyright, must-carry, and retransmission consent regimes that have been "developed by Congress and the Commission over decades." Reply Comments of the ABC Television Affiliates Association, MB Docket No. 10-71 (July 24, 2014) at 5-7 (noting that, in enacting the retransmission consent requirement, Congress expressly "'relied on the protections which are afforded local stations by the [program exclusivity] rules'") (quoting Senate Report at 38). *See also, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 10-71 (June 26, 2014), Appendix A; Comments of the ABC Television Affiliates Association, MB Docket No. 10-71 (June 26, 2014) at 4-14; Comments of the Walt Disney Company, MB Docket No. 10-71 (June 26, 2014) at 2-7. The Commission itself

In any event, no blanket prohibition on local stations' exercise of valid contractual exclusivity rights is necessary, because the existing good faith test has long been adequate to evaluate negotiations for out-of-market carriage. Ten years ago, in the *Reciprocal Bargaining Order*, the Commission observed that the good faith negotiation rule governs *all* retransmission consent negotiations and that "[t]here is no statutory or regulatory distinction between in-market carriage and out-of-market carriage pursuant to retransmission consent."[69] From that premise, the Commission reasoned that the good faith rules "permit the Commission to account for the distinction between in-market and out-of-market signals in determining compliance under the totality of the circumstances test."[70] The Commission should adhere to that longstanding

---

has noted that retransmission consent, mandatory carriage, network non-duplication, syndicated exclusivity, and copyright compulsory licensing rules are an integral part of the "mosaic" of program exclusivity, copyright, and retransmission consent rules and regulations that operate together "to implement key policy goals." *2005 Report to Congress*, 2005 FCC LEXIS at * 48, ¶ 33.

The *Notice* observes that the Commission's retransmission consent proceeding has not yet concluded and proposes to simply "refer to" "certain pleadings filed in the 2011 rulemaking." *Notice*, ¶ 5 & n.30. That procedure raises a host of problems, not the least of which is the complexity and volume of filings—to date, nearly 1,000—in that docket. A general reference to comments filed in that voluminous docket cannot possibly supply the degree of notice of the Commission's intended rulemaking that the Administrative Procedure Act ("APA") demands. *See* 5 U.S.C. § 553(b)-(c). Interested parties cannot possibly anticipate and respond to unspecified issues and arguments raised in that enormous docket. *See, e.g., CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) ("[A] final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts….") (citation and internal quotation and alteration marks omitted).

69 *Reciprocal Bargaining Order*, 20 FCC Rcd at 10351, ¶ 27; *see also id*. at 10352, ¶ 28 ("retransmission consent carriage of significantly viewed signals is permissive").

70 *Reciprocal Bargaining Order*, 20 FCC Rcd at 10352, ¶ 29 (finding that "the determination of what conduct constitutes a breach of the duty of good faith is necessarily contextual").

approach, determining whether a broadcaster and an MVPD have negotiated for the retransmission of an out-of-market, not-significantly-viewed station (or a prohibition on such retransmission) in good faith on the particular facts of each negotiation (and should find no violation of the good faith rules where a broadcaster does no more than invoke its bargained-for contractual exclusivity rights).

Finally, a rule that would effectively prohibit broadcast stations from enforcing (and MVPDs agreeing to honor) their bargained-for exclusivity rights would unsettle the tightly woven, interlocking scheme of statutes and regulations that govern the video programming distribution ecosystem—what the Commission in 2005 labeled a "mosaic" of governing legal rules.[71] For decades, the Commission's program exclusivity rules, which honor the bargained-for contractual program exclusivity rights of local broadcasters, have played a critical role in balancing important copyright, communications, and competition goals and policies in the video programming marketplace. From their inception five decades ago, the program exclusivity rules have been designed to ensure a level playing field between local broadcasters and MVPDs and to promote the Commission's central goals of competition and broadcast localism. What's more, when it enacted the retransmission consent regime in the 1992 Cable Act, Congress expressly relied on the Commission's program exclusivity rules and understood that program exclusivity and retransmission consent would operate in tandem.[72]

In addition, the ability to bargain for program exclusivity—and Commission rules that protect those bargained-for rights—are essential to local broadcast stations' ability to fulfill their

---

[71] *2005 Report to Congress*, 2005 FCC LEXIS 4976, *48, ¶ 33.

[72] *See* Senate Report at 38.

public service obligations. Commission rules that protect bargained-for exclusivity rights allow local stations to maximize viewership and, thereby, advertising revenue—the single most significant source of revenue that allows local stations to create locally-oriented programming and to acquire that mix of network and syndicated programming that they determine will best attract viewers, and, hence, advertisers. As the Commission put it in 1987, "[t]he main purpose and effect [of the exclusivity rules] is to allow the local affiliates to protect their revenues in order to make them better able to fulfill their responsibilities as licensees of the Commission."[73] At the same time, the Commission recognized that "ensur[ing] free and efficient functioning of competitive market processes" in the television programming distribution setting requires rules that "permit[] *broadcasters to acquire and enforce* the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise."[74] The program exclusivity rules, as the Commission understood more than a quarter-century ago, are essential to ensuring symmetrical treatment of competitors—and thus a fair, robust, and competitive marketplace.

A new "rule" that effectively prohibits broadcasters from negotiating for a restriction on importation of out-of-market (and non-significantly-viewed) signals would violate that fundamental principle. The terms and the conditions of retransmission consent, including important terms directed to program exclusivity rights, should be negotiated at arm's length by private parties. Indeed, that is the very predicate for the program exclusivity rules. In its *2005 Report to Congress*, the Commission acknowledged that,

---

[73] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rulemaking, 2 FCC Rcd 2393, ¶ 48 (1987) ("*1987 Program Exclusivity NOI/NPRM*").

[74] *1987 Program Exclusivity NOI/NPRM*, ¶ 12 (emphasis added).

> [b]y requiring MVPDs to black out duplicative programming carried on any distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights.[75]

The Commission must not lose sight of the critical importance of those rules in this proceeding.

d. Micromanagement of the substantive terms and conditions of retransmission consent agreements would paralyze the Commission.

As a practical matter, amendments to the Commission's good faith rules that would effectively inject the Commission into the evaluation of deal points and micromanagement of the terms and conditions of individual retrans agreements would require a staff of thousands of regulators. The abrogation of such rules would, in short, require the Commission to establish and fund a new "Good Faith Negotiation Bureau." Retransmission consent negotiations take place every day; thousands of agreements are negotiated each year by hundreds of local television stations, and each of those agreements contains a multiplicity of terms and conditions directed to a variety of interrelated issues.[76] The good faith negotiation rules proposed in the *Notice* would inject the Commission into the minutiae of each of those painstakingly-negotiated agreements. The time, staffing, and other resources necessary to undertake such detailed administrative oversight, second-guessing, and revision of the terms of every retransmission consent agreement would not be an efficacious use of public resources.

The back-and-forth negotiation process the Commission has long envisioned and encouraged simply cannot be subject to Commission regulatory micromanagement, and the

[75] *See 2005 Report to Congress*, 2005 FCC LEXIS 4976, *27-28, ¶ 17.

[76] In other proceedings, commenters have described the numerous complicated and interrelated issues involved in retransmission consent negotiations. *See, e.g.*, *In re Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, Opposition of the National Association of Broadcasters to Petition for Rulemaking, MB RM 11728 (Sept. 29,

multitude of exceedingly complex agreements that result from that process cannot be subject to the Commission's substantive review and approval, without the imposition of an enormous financial burden on the Commission, MVPDs, and local television stations—the cost of which could better be used to enhance the service ultimately provided to viewers.

3. The process-oriented rules proposed in the *Notice* would unnecessarily and unproductively ensnarl the Commission in the retransmission consent negotiation process.

The *Notice* posits a series of rules directed to the specifics and mechanics of the retransmission consent negotiation process. Without exception, MVPDs' multiple proposals are unnecessary at best and potentially harmful at worst, threatening to delay, complicate, and burden the negotiation process, with little, if any, corresponding benefit to market participants or the viewing public. Each should be rejected.

a. There is no need to regulate either the time for retransmission consent negotiations to commence or the expiration of retrans agreements.

The *Notice* asks whether broadcasters should be required to submit written retransmission consent proposals to MVPDs at least 90 days before an existing agreement is set to expire. The Commission need not and should not adopt such a rule, particularly one that subjects broadcasters *alone* to a deadline for written proposals. MVPDs and broadcasters alike remain free, of course, to make retransmission consent proposals at any time. No "timing" rule is necessary, but if the Commission were to impose one, it must be bilateral.

2014) at 12; Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 76-77; Comments of the National Association of Broadcasters, MB Docket No. 10-71 (May 27, 2011) ("NAB Retrans Comments") at 36-37.

Moreover, as a practical matter, retransmission consent negotiations regularly come down to the last day before an agreement is set to expire, regardless of when the negotiation process begins. Last-minute negotiations are the rule, not the exception—and are employed by some MVPDs as a matter of negotiating strategy. But that fact does not indicate a failure in the retransmission consent negotiation framework, nor does it suggest that a rule requiring negotiations to commence earlier in the process would lead to a difference in substantive outcomes. It follows that any requirement to initiate the retransmission negotiation process at a particular point in time is likely to have little, if any, positive effect on the *conclusion* of negotiations and the execution of an agreement (and could, in fact, simply prolong the negotiation process, raising transaction costs for all parties).

The other "timing" rule proposed in the *Notice* is equally unnecessary: There should be no regulatory prohibition on retransmission consent agreements expiring just prior to a so-called "marquee" sports or entertainment event. To begin with, MVPDs would like to prohibit broadcasters from using football playoff and championship games, the Super Bowl, and other similar events as retransmission consent negotiating leverage, arguing that their subscribers should not be prevented from enjoying such "marquee" events during a negotiating impasse. That argument fails to mention (1) that broadcast networks have paid hundreds of millions of dollars for the rights to provide many of those so-called "marquee" events, (2) that local network affiliates, combined, have paid hundreds of millions of dollars to their networks to help the networks acquire those "marquee" events, (3) that broadcasters compete head-to-head with pay-TV programmers (including MVPDs such as DIRECTV, with its NFL Sunday Ticket package) for these rights, and those programmers are not subject to this kind of regulation, and (4) that these program events are available to MVPD subscribers for *free* over-the-air or from another local MVPD. Neither broadcast networks nor local affiliate stations make those enormous investments in programming in order to enrich MVPDs; they invest in "marquee" programming to attract the largest possible viewing audiences to those events.

It is, of course, in the best interests of local affiliate stations to ensure that all MVPDs provide those events to their subscribers in order to fulfill the purpose of broadcasters' initial investments: ensuring the largest viewing audience possible. But broadcast stations have every right to expect MVPDs to recognize that "marquee event" programming is especially popular among their subscribers—and to make the investment to ensure that their subscribers will be able to access those "marquee" broadcast programs made possible only through the fast-growing rights fees paid by broadcasters. Broadcasters do not necessarily like, or approve of, the increasing costs of obtaining that programming, but they compete for those rights in a highly competitive market and pay those fees so that they can be the *exclusive* providers of "marquee" events, for their viewers' enjoyment. And, understandably, MVPDs may not necessarily like, or approve of, paying higher (but nevertheless reasonable) retransmission consent fees to those same broadcasters, but they should expect to make similarly necessary investments if they wish to be the pay-TV service that is granted the right, by the broadcast station that owns the right, to resell those "marquee" events to the MVPD's subscribers. It is an indisputable reality of today's video market that if broadcasters are unwilling to pay for the rights to "marquee" events, the owner of the rights—the NFL, the NCAA, the NBA, NASCAR, and so on—will simply sell them to a pay-TV company or establish their own pay-TV service and network.

Indeed, where broadcasters have been unable or unwilling to pay those rights fees, "marquee" programming rights have been sold to non-broadcast platforms. As one illustration, in 2008, ESPN outbid Fox for the continued rights to provide premier college football playoff games.[77] The significant rights fees paid by ESPN for those rights almost certainly resulted in an increase in fees demanded by ESPN from MVPDs, and, quite likely, increased subscriber rates, although MVPDs never blame non-broadcast networks for increases in cable or satellite rates. Only broadcasters are blamed, although broadcast stations provide many more premier or "marquee" sports events than does ESPN. And ESPN's bid meant that highly valued programming moved off the free, over-the-air platform and onto pay-TV.

If an MVPD is not willing to provide a reasonable per-subscriber fee to the local broadcast station in order to make that "marquee" programming (along with other highly-valued broadcast programming) available to its subscribers, local broadcast stations must be free to withdraw or withhold those rights from the MVPD. It is, then, the MVPD's choice that makes "marquee" programming unavailable to its subscribers; it is not the broadcast station's decision. If the Commission intends to ensure that the retransmission consent marketplace remains free and open and that retransmission consent negotiations are conducted in good faith, it should not allow MVPDs to strip from broadcasters the value of their investments in premier program events.

Definitional problems aside, as a policy matter, any "marquee event" timing rule would involve the Commission in the setting a particular *substantive* term of individual retrans agreements: their expiration dates. As noted above, from the very outset of the good faith negotiation requirement, the Commission has eschewed involvement in determining the terms and conditions of individual retrans agreements. No sound reason warrants a departure from that settled practice in order to override an agreed-upon expiration date resulting from arm's-length negotiation by market participants.

---

[77] *See* Lynn Zinser, "ESPN Outbids Fox Sports and Wins B.C.S. Rights" (Nov. 18, 2008), available at http://www.nytimes.com/2008/11/19/sports/ncaafootball/19bcs.html?_r=0 (last visited Nov. 30, 2015).

And as a practical matter, such a rule would be essentially impossible to articulate or enforce, given that the broadcast industry's "marquee" (however that term would be defined, because the *Notice* offers no definition) sports and entertainment events are sprinkled throughout the year: awards shows, sporting events and tournaments (NCAA basketball tournaments, the Super Bowl, Wimbledon, the Masters, and the World Series, to name only a few), season premiers and finales, holiday specials, and countless others. Any attempt to time the expiration of every one of the thousands of retransmission consent agreements to avoid any coincidence with any so-called "marquee" event would be doomed to failure.

b. The Commission should adhere to its longstanding refusal to impose a disclosure obligation on negotiating parties.

Broadcast stations and MVPDs should not be required to provide "information substantiating reasons for positions taken" in retransmission consent negotiations when requested by the other party.[78] This too is an issue the Commission considered and resolved in the *Good Faith Order,* where it concluded that broadcasters must "provide reasons for rejecting any aspects of the MVPD's offer" but that the good faith rules are "not intended as an information sharing or discovery mechanism" and that "[b]roadcasters are not required to justify their explanations by documentation or evidence."[79]

---

[78] *Notice,* ¶ 16(v).

[79] *Good Faith Order,* 15 FCC Rcd at 5464, ¶ 44. *See also ATC Broadband,* 24 FCC Rcd at 1650, ¶ 11 ("[W]hile a broadcaster must provide reasons for rejecting any aspect of an MVPD's offer, and a blanket rejection without explanation does not constitute good faith, broadcasters are also not required to justify their explanations by document or evidence."); *In re Mediacom,* 22 FCC Rcd at 41, ¶ 15 ("[G]ood faith negotiation requires both parties to explain their reasons for putting forth or denying an offer" but does not require either party to "empirically prove that its offers are consistent with marketplace considerations or violate the good faith rules.").

As a practical matter, a rule requiring parties to "substantiate" reasons for their negotiating positions, beyond those minimal "explanation" requirements already in place, would serve only to slow down and complicate retrans negotiations, making the process more cumbersome, costly, and inefficient. Indeed, a "substantiating disclosure" rule would create opportunities for disgruntled parties to litigate the question of the timing and adequacy of other parties' disclosures, resulting in (unnecessary) litigation expense, delay, and confusion to viewers.

c. A "surface bargaining" rule is unnecessary, as the core good faith requirement already regulates a failure to enter negotiations with a genuine intent to reach agreement.

For similar reasons, the Commission should not impose a rule prohibiting stations and MVPDs from engaging in "conduct designed to delay retrans negotiations"—which the *Notice* calls "surface bargaining."[80] It is unclear what the *Notice* means by "delay." Any objection by a party to a rate, term, or condition posed by the other will "delay" a negotiation. The proposal for regulating "delay" is hopelessly vague. Does the Commission intend to require that retrans negotiations be initiated by a certain date in advance of the expiration of an existing agreement, or does it intend effectively to *require* one party to yield to another's demand in order to resolve disputes without "delay"? If the former, a rule dictating the commencement of negotiations is neither necessary, appropriate, nor practical.[81]

And if the latter, the Affiliates Associations object to a rule that parties are precluded from negotiating if negotiation would (arguably) produce "delay." Both broadcast stations and MVPDs are required to negotiate retransmission consent "in good faith," and, as indicated above, the overwhelming majority of retrans negotiations are conducted and concluded successfully within

---

[80] *Notice*, ¶ 16(vi).

[81] *See* Section 3.a, *supra*.

the process established by statute and the Commission's regulations. However, the Commission cannot and should not cite "conduct designed to delay retrans negotiations" as a specific indicator of bad faith in the abstract, even assuming that (the inherently vague concept of) "conduct designed to delay retrans negotiations" is capable of definition and identification. Nor need it do so: The "totality of the circumstances" test as it currently exists is designed to identify conduct that evidences a lack of good faith negotiation on the unique facts of a particular case; among those many unique facts are the timing and substance of each parties' bargaining positions. The Commission should continue to apply its flexible test on a case-by-case basis as complaints are brought to it for resolution. In any event, the issue is largely self-policing, as both MVPDs and broadcast stations have a vested interest in concluding negotiations and renewing retransmission consent agreements in a timely fashion. No rule prohibiting conduct "designed to delay" is necessary.

On a related note, the *Notice* asks whether parties should be prohibited from attempting to "manufacture" a retransmission consent dispute in hopes of encouraging government intervention.[82] Although there is no question but that some MVPDs have engaged in this practice, a rule prohibiting the attempt to manufacture a retrans dispute in hopes of encouraging government intervention would be all but impossible to articulate and enforce. The concern behind the question reflects a more fundamental point: Some MVPDs *are* attempting to "manufacture" retransmission consent disputes to build support for the one-sided changes that were included in the *Notice*. The Commission needs to consider that it is rewarding what it considers "bad behavior" (that is, cable and satellite service disruptions) by taking seriously the claims from those MVPDs that do, in fact,

[82] *Notice*, ¶ 16(xv).

manufacture disputes and disruptions of service. For certain MVPDs, failure of negotiation *is a regulatory strategy*. Unless the Commission takes appropriate steps to penalize, rather than reward, bad behavior, it is likely to get more of the same behavior. The National Association of Broadcasters has suggested various proposals to impose a cost on MVPDs that deliberately engage in "strategic" disruptions of service, such as allowing subscribers to terminate, without penalty, fixed-term contracts, ordering mandatory refunds of subscription fees for unavailable stations, and requiring the waiver of "termination fees" imposed under long-term contracts. The Affiliates Associations urge the Commission to consider these proposals as a measured approach to counter the strategy of certain MVPDs to manufacture retransmission consent disputes for political, and other non-business, reasons. In addition, the Commission should impose appropriate sanctions on parties that have misused the good faith complaint process or otherwise abused the Commission's processes. Where at least one large MVPD attempted to manufacture a retransmission consent dispute to obtain regulatory favor, the Commission took appropriate action through application of the existing good faith rules.[83]

4. Commission regulation of "bundling" is unnecessary because the antitrust laws regulate anticompetitive behavior in retransmission consent negotiations.

The *Notice* asks whether the Commission's longstanding policy of permitting a station to "bundle" its broadcast signal with (a) other cable or satellite programming services, (b) the signals of other co-owned stations, or (c) the station's multicast channels should be altered.[84] It should

[83] *See, e.g.*, *In re EchoStar*, 16 FCC Rcd at 15075, ¶ 12, (admonishing EchoStar (now DISH) for abuse of the Commission's process); *cf. In re Jorge L. Bauermeister*, 22 FCC Rcd 4933 (finding Choice Cable T.V. breached its duty to negotiate retransmission consent in good faith).

[84] *Notice*, ¶ 15. In fact, MVPDs traditionally favored non-cash forms of compensation (such as the carriage of additional programming). *See 2005 Report to Congress*, 2005 FCC LEXIS 4976, *11-12, 52 ¶¶ 10, 35.

not. From the very inception of the good faith negotiation rules, the Commission has found that broadcaster proposals for carriage of affiliated programing are presumptively in good faith, describing "[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market" as one example of "bargaining proposals [that] presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement."[85] "Bundling" proposals are one of the many substantive terms of retransmission consent agreements that must be left to the parties to negotiate:

> Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal.[86]

A Commission decision to tie broadcasters' hands by dictating the non-cash compensation for which they may negotiate in exchange for their consent for retransmission of their signals would contravene not only Section 325,[87] but also the Commission's own long and substantial body of regulatory decisions and policy.

[85] *Good Faith Order*, 15 FCC Rcd at 5469-70, ¶ 56.

[86] *Good Faith Order*, 15 FCC Rcd at 5462, ¶ 39 (footnote omitted); *see also Reciprocal Bargaining Order*, 20 FCC Rcd at 10347, ¶ 17 ("Whether an MVPD carries a broadcaster's entire free, over-the-air signal, be it high definition or multicast, is a matter to be determined through the retransmission consent negotiation process.").

[87] The legislative history of the 1992 Cable Act indicates congressional intent that parties might negotiate for non-cash compensation *in the form of carriage of additional programming*. *See* Senate Report at 36 (describing "the right to program an additional channel on a cable system" as an appropriate form of retransmission consent compensation).

The Commission need not revisit its longstanding position on bundling in order to guard against anticompetitive behavior. As the *Notice* indicates, the antitrust laws provide a separate legal framework that is intended to identify and address potentially anticompetitive practices.[88] The *Good Faith Order* appropriately deferred to that legal regime to identify and prohibit "'[c]onduct that is violative of national policies favoring competition—that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market….'"[89] "Bundling" of products, however, is not inherently anticompetitive. In fact, "bundling" is commonplace in various sectors of the economy,[90] and the economic efficiencies it can afford are well established. In particular, "[b]undled discounts generally benefit buyers because the discounts allow the buyer to get more for less."[91] To be sure, "bundling can constitute an injury to competition," but only where "a bundler is able to use discounting…to 'exclude rivals

[88] *Notice*, ¶ 15.

[89] *Notice*, ¶ 15 (quoting *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58).

[90] *See generally SmithKline Beecham Corp. v. Abbott Laboratories*, No. C 07-5702 CW, 2014 U.S. Dist. LEXIS 164367, *16 (N.D. Cal. Nov. 24, 2014) ("'Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately. A bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually.'") (quoting *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)).

[91] *Cascade Health Solutions*, 515 F.3d at 895; *see also* Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 17.13[A], [E] at 17-159 to -161, 17-166 to -168 (Supp. 2015) (noting that tying saves distribution and transaction costs).

who do not sell as great a number of product lines.'"[92] Similarly, tying[93] can be anticompetitive, but only "when 'the seller has market power over the tying product,' and the seller 'can leverage this market power through tying arrangements to exclude other sellers of the tied product.'"[94] In the increasingly competitive video content market—in which a local broadcast station provides only one of a thousand available channels of programming for traditional MVPD platforms and infinitely more programming is accessible on line—no one could seriously contend that broadcasters have the degree of "market power" necessary to engage in anticompetitive "tying."[95]

Because bundling is not inherently anticompetitive, broadcasters should remain free to negotiate for carriage of other programming in any circumstance that is not unlawful under the antitrust laws.[96] Broadcasters engaged in retrans negotiations routinely present MVPDs with options to carry their broadcast stations alone or in combination with other programming.

---

[92] *Brantley v. NBC Universal, Inc.*, 649 F.3d 1078, 1084 (9th Cir. 2011) (quoting *Cascade Health Solutions*, 515 F.3d at 897).

[93] "Tying is defined as an arrangement where a supplier agrees to sell a customer a product, but 'only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Brantley*, 649 F.3d at 1084 (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958)).

[94] *Brantley*, 649 F.3d at 1084 (quoting *Cascade Health Solutions*, 515 F.3d at 912).

[95] *See, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 14-16 (Mar. 21, 2014) at 7-22 ("NAB Video Competition Comments") (noting that "[t]he Commission no longer provides an estimate of the total number of national video programming networks, but its most recent estimate was 800 networks") (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual Report, 27 FCC Rcd 8610 (2012) at n.96). At the same time, the MVPD segment is increasingly horizontally concentrated on national, regional, and local levels. NAB Video Competition Comments at 14-18.

[96] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58. *See also Reciprocity Order*, 20 FCC Rcd at 10346, ¶ 15 (declaring that "tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws").

Appropriate compensation is negotiated from the "menu" of options proposed by the parties, which may or may not include monetary payments, the purchase of advertising, carriage of additional programming, and more. Indeed, MVPDs customarily prefer, in terms of transactional efficiencies, to negotiate for multiple channels and stations in a single negotiation. Proposals for additional carriage are discussed and negotiated. Some negotiations end in agreement for carriage (and sometimes additional programming is carried, but the MVPD makes no additional payment—so that the MVPD's subscribers are the real "winners"), but many negotiations conclude without the MVPD agreeing to carry any additional or non-broadcast channels. That is precisely the kind of market-driven, arm's-length negotiation that Section 325 and the Commission's rules envision. The marketplace works. Proposals for carriage of additional programming "are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[97] No MVPD is *forced* to accept a "bundle" of programming. For that matter, MVPDs, themselves, "bundle" when they negotiate retransmission consent with a broadcaster for all the MVPD systems they own. MVPDs are not required by the Commission to bargain separately for carriage on each separate system, and broadcast stations, in turn, should not be prohibited from bargaining for carriage of multiple channels or multiple stations.

Applying these principles, the Commission denied a "tying" claim in *In re EchoStar*. The Commission there rejected an argument by EchoStar ("DISH") that a broadcast station failed to negotiate in good faith when it insisted that EchoStar carry a co-owned independent station in order to secure carriage of the station's network-affiliated stations. The Commission reiterated that "it will not prohibit proposals of substantive terms, such as offering retransmission consent in

[97] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 56.

exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal . . . . Good faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD *cannot accommodate* such carriage."[98] As the emphasized language indicates, good faith does not require a broadcaster to forego a request for carriage of additional programming when an MVPD *does not want to* accommodate the carriage.

No change in the governing statutes, and no market developments, warrant departure from the Commission's longstanding and sound regulatory policy permitting broadcaster proposals for carriage of additional programming during retransmission consent negotiations. Broadcasters are aware of no finding by the Commission (or any court) that any broadcast station has engaged in improper "bundling." Nor, to the knowledge of the Affiliates Associations, has the Commission ever found a broadcast station to have engaged in "take it or leave it" negotiation with respect to the carriage of additional programming—or otherwise. This, like the other MVPD proposals, plainly falls within the "solution in search of a problem" category. Nothing in the successful history of retransmission consent negotiations warrants Commission prohibition of "bundling" as a permissible element of retransmission consent compensation.[99]

The *Notice* also asks whether a station that bundles negotiation for retransmission of its signal with a co-owned cable or satellite network or program service should be allowed to require

---

[98] *In re EchoStar*, 16 FCC Rcd at 15079, ¶ 21 (emphasis added). The record showed that the broadcaster clearly offered EchoStar the option of a bundled or unbundled retransmission arrangement.

[99] In fact, broadcasters' ability to negotiate for carriage of additional programming has significant benefits to the viewing public: It enables new, niche, and diverse programming to reach the viewing public. *See* NAB Retrans Comments, MB Docket No. 10-71, at 54-55.

the MVPD to guarantee that the affiliated network or program service will reach a certain minimum percentage of the MVPD's customers.[100] Broadcast stations typically request that their signals be retransmitted on the MVPD system's most widely distributed service tier. The Commission might better have asked why there should not be a presumption that an MVPD's desire to restrict programming services from reaching *all* subscribers amounts to bad faith—a result far more directly harmful to consumers than a broadcast station's request to guarantee minimum penetration levels.

In any event, broadcast stations should be free to negotiate for minimum penetration levels just as they are free to propose any other substantive contract term not otherwise prohibited by law. In fact, the Commission expressly rejected an MVPD proposal that retransmission consent tied to "minimum subscriber penetration levels" should be deemed a violation of the good faith negotiation obligation, concluding instead that "the substance of [retransmission consent] agreements generally should be left to the market."[101] There is no reason—and the *Notice* cites none—for revisiting that determination.

5. The Commission should exercise caution in regulating the role of networks in the context of affiliate retransmission consent negotiations.

a. Networks should not be permitted to commandeer affiliate stations' retransmission consent negotiations.

The *Notice* seeks comment on the appropriate parameters, if any, for broadcast network involvement in a network-affiliated station's retransmission consent negotiations.[102] The issue

[100] *Notice*, ¶ 16(x).

[101] *Good Faith Order*, 15 FCC Rcd at 5461-62, ¶¶ 37, 39.

[102] *Notice*, ¶ 14.

raises two related questions for consideration: (1) whether networks should be allowed to negotiate retransmission consent on behalf of their affiliates, and (2) to what extent networks should be permitted to restrict the geographic scope of an affiliate's retransmission consent.

Broadcast networks should not be permitted to confiscate or hijack the retransmission consent negotiation rights of their affiliates, either directly or indirectly through the threat of disaffiliation or the imposition of less advantageous affiliation terms. Although it is not relevant to the issue of "good faith negotiation," the subject of this proceeding, any attempt by a broadcast network to appropriate the statutory *right* (indeed, statutory *responsibility*) of an affiliate to negotiate retransmission of the affiliate's signal raises fundamental questions of network overreach in violation of the core policies underlying the Commission's separate and longstanding network affiliate rules. It also raises a basic issue of abdication of licensee responsibility. Under the Commission's well-established network rules, networks should not be permitted to confiscate, directly or indirectly, the right and responsibility of their affiliates to negotiate retransmission consent.[103] As the Commission has made clear, "[i]t is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer control of his station directly to the network . . . .[104]

[103] *See* 47 C.F.R. § 73.658(d), (e) (restricting networks from interfering with the program decisions of an affiliate and from "optioning" an affiliate's broadcast time).

[104] *See generally* 47 U.S.C. § 310(d); *Report on Chain Broadcasting*, Docket No. 5060 (May 1941), at 66; *see also Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting*, 63 FCC 2d 674, 690 (1977); *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978).

Among affiliates' concerns in this respect are that a network might attempt to negotiate a retrans agreement for an affiliate without due regard for (by way of example) pertinent local market conditions, the affiliate's other network or syndicated programming, or the affiliate's local news, public service, and public safety programing, leaving affiliates with little discretion in setting the terms and conditions of their consent to retransmission of their signals, a result that obviously would run counter to the core principles and purposes of the retransmission consent requirement. Network confiscation of an affiliate's retransmission consent responsibility would also grant them access to confidential, competitive information from MVPDs that would not otherwise be available to the network and that could later be used by the network to intrude on a local affiliate's service to its community. Finally, networks negotiate retransmission consent for their owned stations, which in other markets may compete with stations owned by the network's affiliate, and this too would grant access to confidential information that could be used by the network for anticompetitive purposes against the network affiliate. It was plainly the intent of Congress that local stations be free to negotiate retransmission with local MVPDs.

As discussed more fully below, the Affiliates Associations recognize and, indeed, support the right of their networks under copyright law to specify certain terms under which their intellectual property may be distributed by an affiliated station, just as each local station has the right under copyright law to determine the terms under which MVPDs may distribute the station's own, locally-produced programming. The retransmission consent requirement clearly does not trump copyright law, and the Commission's limited authority to oversee the retransmission consent negotiation process cannot override the copyright-protected right of programmers to establish the terms under which their intellectual property may be distributed.[105] Any rule implemented by the Commission must strike a careful balance between these considerations: Networks cannot be permitted to coerce and usurp the statutory retransmission consent negotiation rights of their affiliates, but, as owners of copyright-protected property rights in network programming, networks may place reasonable restrictions on the authority of their affiliates to distribute their network's programming.

b. As owners of copyrighted works, networks must remain free to determine the geographic scope of affiliates' retransmission consent authority.

The Commission has asked whether network affiliation contracts that prohibit an affiliate station from granting retransmission consent outside its market even where the station is "significantly viewed" should be prohibited.[106] The Commission has previously considered and answered the question, and the *Notice* provides no basis for reconsidering that decision. The Commission made clear in the *Reciprocal Bargaining Order* that it would not regulate the terms of network affiliation agreements to prevent geographic restrictions on an affiliate's retransmission consent authority.[107] Later that year, the Commission affirmed its position and explained why it

[105] Section 106(3) of the Copyright Act vests copyright owners with the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). *See also* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed…as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."); *Signal Carriage Order*, 8 FCC Rcd at 3005, ¶ 173 ("Just as Congress made a clear distinction between television stations' rights in their signals and copyrights holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

[106] *Notice*, ¶ 17.

[107] *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354, ¶ 33.

would be inappropriate to impede broadcast station contractual program exclusivity arrangements that directly advance important Commission policy objectives:

> We do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.[108]

The Commission applied this principle to a cable operator's 2008 good faith complaint against a local network-affiliated station that had offered, and subsequently withdrawn, a retransmission consent agreement based on a prohibition in the station's network affiliation agreement barring carriage of the station on cable systems located outside the system's market unless the station was "significantly viewed or had been historically carried" in the cable system's area.[109] The Commission again refused to interfere with a privately-negotiated contract between a network and its affiliate:

> [T]he Commission stated in the *SHVERA Reciprocal Bargaining Order* that "neither the text nor the legislative history of the SHVIA or the SHVERA indicate a congressional intent to restrict the rights of networks and their affiliates through good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming…[to] interfere with the network-affiliate relationship or to preclude specific terms in network-affiliate agreements." As the

[108] *2005 Report to Congress*, 2005 FCC LEXIS 4976, *78, ¶ 50; *see also id*. at *76, ¶ 49 ("[C]able operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers."). The Commission's report expressly rejected cable operators' proposal to make the network non-duplication and syndicated exclusivity rules "unenforceable with respect to stations that elect retransmission consent" "when the cable operator and broadcaster are unable to reach agreement and the cable operator seeks to carry a duplicating distant signal in lieu of the local broadcast signal." *See id*. at *71, *77-78, ¶¶ 46, 50. It likewise rejected a cable operator's call for a rule that would prohibit broadcast stations and programming suppliers "from entering into contractual arrangements that would prevent the importation of duplicating distant signals into a local market in cases where the local station elects retransmission consent and seeks any terms beyond carriage and channel placement." *Id*. at *72, ¶ 46 n.157 (internal quotation marks omitted).

[109] *ATC Broadband*, 24 FCC Rcd at 1647-48, ¶ 5.

> Commission reaffirmed in its *2005 Report to Congress*, "cable operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers." In that *Report*, the Commission declined to endorse or recommend modifications to the network non-duplication rules that would have superseded "contract arrangements between broadcasters and their program suppliers that are permitted by the rules."[110]

The Commission, accordingly, found no breach of the station's obligation to negotiate retransmission consent in good faith under the totality of the circumstances:

> Although the parties are in different DMAs, WSWG appears to have commenced carriage negotiations with ATC Broadband in earnest and even offered retransmission consent terms for further approval. WSWG's abrupt retraction of its retransmission consent offer and its failure to thereafter correspond with ATC Broadband, given the circumstances presented in this negotiation [in which the station initially was unaware that the terms of its network affiliation agreement would not permit carriage of the station's signal outside its market unless an exception was met], do not evidence lack of good faith.[111]

The Commission held in 2005 that "neither the text nor the legislative history of the SHVIA or the SHVERA indicate a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming."[112] Since that *Report*, the Commission has confirmed that contractual restrictions in network affiliation agreements limiting the geographic area in which an affiliate station is authorized to grant retransmission consent are not indicative of bad faith,

---

[110] *ATC Broadband*, 24 FCC Rcd at 1651 ¶ 15 (quoting *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354, ¶ 33, and *2005 Report to Congress*, 2005 FCC LEXIS 4976, ¶ 49 (Sept. 8, 2005)).

[111] *ATC Broadband*, 24 FCC Rcd at 1649-50, ¶ 10.

[112] *Reciprocal Bargaining Order*, 20 FCC Rcd at 10354, ¶ 33; *see also id*. at 10355, ¶ 34 ("the Commission did not intend to affect the ability of a network affiliate agreement to limit redistribution of network programming") (citing *Monroe*, 19 FCC Rcd at 13997, n. 24 for the proposition that "the good faith requirement applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate").

rejecting cable companies' challenge to an affiliate's withdrawal of a retransmission consent proposal where the station's network affiliation agreement contained a prohibition on out-of-market carriage.[113] The Commission should not now reverse a ten-year-old holding and factual determination or impose such a limitation in the guise of administrative rulemaking—and cannot, for the simple reason that the Commission's rules cannot trump copyright law.

Networks and program rights holders have the right under copyright law to establish and limit the geographic areas in which they license the exhibition of their copyright-protected property and to control the terms under which they grant those licenses. That right does not detract from but instead works in tandem with the retransmission consent regime, as the Commission has long recognized:

> [C]opyright law and retransmission consent rules operate in a complementary fashion. The statutory compulsory license compensates rights holders for use of their property, while permitting MVPDs to retransmit their programming without costly and time-consuming negotiations with individual copyright holders. Further, the government-established copyright fee for distant signals, which is higher than that for local stations, operates together with the network non-duplication and syndicated exclusivity rules to encourage MVPD carriage of local broadcast signals.[114]

The 1992 Cable Act envisioned just such an interplay, as the Commission noted in the *Signal Carriage Order*: "Congress intended that local stations electing retransmission consent should be

---

[113] *See In re ATC Broadband*, 24 FCC Rcd at 1645-46.

[114] See *2005 Report to Congress*, 2005 FCC LEXIS 4976, *48-49, ¶ 33; *see also id*. at *77-78 & n.171; Senate Report at 38 ("[T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.").

able to invoke network nonduplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."[115]

In all events, significantly-viewed stations cannot be *required*, as the question posed by the *Notice* might imply, to consent to retransmission by an out-of-market MVPD. Such a requirement would be contrary to the very statutory foundation of the retransmission consent regime, which commits to individual stations the decision whether and on what terms to grant retransmission consent.

c. The Commission should not prohibit joint negotiations between non-commonly-owned stations in separate markets.

Finally, the *Notice* asks whether one broadcast station should be allowed to negotiate retransmission consent on behalf of another (non-commonly-owned) broadcast station located in another market.[116] In STELAR, Congress deliberately and expressly limited the joint negotiation prohibition to all *in-market stations*[117] (by enacting a rule broader than the Commission's own now-displaced joint negotiation rule, which only applied to top-four stations in a single market[118]).

---

[115] *Signal Carriage Order*, 8 FCC Rcd at 3006, ¶ 180; *see also id.* at 3005, ¶ 173 (observing that "Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal").

[116] *Notice*, ¶ 14.

[117] *See* STELAR, Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv); 47 C.F.R. § 76.65(b)(1)(viii). If Congress intended the joint-negotiation prohibition to reach beyond a single market, it would have said so expressly; the legislature "does not…hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001). *See also Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23 ("[W]hen Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity.")

[118] *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking (rel. Mar. 31, 2014).

Apart from that express statutory prohibition, however, Section 325 envisions that stations, themselves, will determine how to negotiate retransmission consent, subject to prohibitions on anticompetitive behavior established by the antitrust laws. That expectation is hardly surprising, given the efficiencies, including lowered transaction costs, that can result from joint or coordinated negotiations. Indeed, preserving the ability of broadcast stations to negotiate jointly apart from the statutory prohibition is all the more compelling in light of the rapidly consolidating MVPD industry: Huge consolidated companies such as AT&T/DIRECTV and other MVPDs wield significant market power over most broadcasters, particularly those in smaller markets.[119] Moreover, it would be both arbitrary and exceedingly unfair to prohibit joint negotiations by non-commonly-owned broadcast stations but to permit MVPDs to negotiate as a group. For example, Time Warner Cable and Bright House Networks have for years negotiated retransmission consent jointly.[120]

In short, if Congress intended the joint negotiation prohibition to apply to stations not located in the same market, it would have done so. It did not, and the Commission should not.

---

[119] *See, e.g.* NAB Retrans Comments, MB Docket No. 10-71, at 28-29 & n.73 (citing attached Declaration of Jeffrey A. Eisenach & Kevin W. Caves (May 27, 2011) at 5-7 for the proposition that "the upstream market for MVPD video programming…is far less concentrated than the downstream market for video distribution, which 'remains highly concentrated' among a small number of MVPDs").

[120] *See Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) at 12 (noting that Time Warner Cable "provides programming acquisition, network management, and maintenance services to Bright House Networks pursuant to a management agreement").

6. **The Commission should neither prohibit confidentiality provisions nor require disclosure of retransmission consent agreements.**

As the Commission and the courts have repeatedly recognized, confidentiality provisions are routine in commercial contracts and are regularly embraced by both broadcast stations and MVPDs in retransmission consent agreements. And with good reason: Rate and pricing information reflected in retransmission consent agreements is highly commercially sensitive.[121]

That same respect for the sensitivity of price information and other terms of retrans agreements counsels against a new rule that would require broadcast stations to disclose publicly (that is, place in their public files or otherwise make publicly available) their "retrans rates" or other terms of retransmission consent agreements. Broadcast stations *alone* should not be required to disclose rate cards or other pricing information, either in their online public files or elsewhere.[122] In fact, *neither* party to confidential retransmission consent negotiations should be required to disclose the terms of their agreements.[123] The parties should be left to negotiate the confidentiality provisions of their retransmission consent agreements as they do the other terms and conditions of those agreements.

7. **The Commission cannot compel stations to distribute broadcast signals online.**

The *Notice* raises a number of questions related to the role of online distribution of programming in the context of retransmission consent. It asks, for example, how an MVPD's

---

[121] *See CBS Corp. v. FCC*, 785 F.3d 699, 704-08 (D.C. Cir. 2015) (reversing Commission order permitting disclosure of "video programming confidential information," including "key affiliate contracts" and retransmission consent agreements, to third parties in connection with Commission's cable company merger review).

[122] It is plain to the Affiliates Associations that MVPDs seek one-sided access to that information solely to facilitate price-fixing claims against broadcast stations.

[123] *Notice*, ¶ 16(xii).

demand for online distribution rights, or a broadcaster's refusal to grant those rights, should be treated under the "totality of the circumstances" test.[124] The *Notice* further questions whether broadcast stations should be permitted to block online access by viewers to a station's signal in a retrans negotiation impasse, expressing concern that "online access restrictions prevent all of an MVPD's broadband subscribers, *i.e.*, regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations" and "even if those subscribers do not also subscribe to the MVPD's video service," from accessing the broadcaster's programming online during a retrans dispute.[125] The rule requested by MVPDs would effectively require broadcast stations to obtain the right to distribute their programming online and to consent to distribution on *all* platforms, including online, whenever they consent to distribution on any traditional MVPD platform. What MVPDs seek is, essentially, a government-mandated tying rule, demanding that broadcasters authorize the distribution of their programming on all platforms whenever they consent to retransmission of their signals.

The Affiliates Associations oppose any rule that would mandate online retransmission of a station's signal in connection with retransmission of the signal by a traditional cable or satellite platform—whether during a retransmission consent impasse or otherwise. Broadcast stations are under no legal or regulatory obligation to make their programming available for Internet distribution, and a rule compelling stations to do so would raise serious questions under federal copyright law.[126] Any Commission rule that would effectively force a broadcaster to publicly

---

[124] *Notice*, ¶ 19.

[125] *Notice*, ¶ 13.

[126] Such a rule applied to the Internet would likely raise serious constitutional concerns. *See generally Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (the Constitution assures "both the right to speak freely and the right to refrain from speaking at all") (citations omitted); *Reno v.*

perform its content online would violate the copyright owner's exclusive rights under the Copyright Act to "do or authorize" the public performance of its copyrighted works.[127] That exclusive right includes the right to *decline* to authorize a public performance, as the Supreme Court has made clear:

> [N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.[128]

A Commission rule that broadcast stations *must* make their content available online—a "public performance"—plainly would violate a broadcaster's exclusive right *not* to do so. Such a regulatory command would deprive the copyright owner of the full monetary value of its copyrighted-protected exclusive right: "The limited monopoly granted [by the Copyright Act] is intended to provide the necessary bargaining capital to garner a fair price for the value of the works passing into public use."[129] An "online distribution" requirement would be tantamount to the

---

American Civil Liberties Union, 521 U.S. 844, 867-68 (1997) (declining to apply to Internet speech the lesser standard of First Amendment scrutiny applicable to broadcast speech). The Commission apparently recognizes the potential constitutional implications of such a rule, as the *Notice* asks whether a rule that blocking an MVPD's online subscribers amounts to broadcaster bad faith would create statutory or constitutional issues. *Notice*, ¶ 13.

[127] *See* 17 U.S.C. § 106(4). A rule mandating online distribution would also conflict with Congress's explicit admonition that the retransmission consent requirement was not "intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements." Senate Report at 36.

[128] *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); *see also* Goldstein on Copyright (Aspen Publishers Online 3d ed. 2013) § 7.0 ("Copyright law's exclusive rights, including the authorization right, entitle a copyright owner to refuse to license use of its work for any reason, or for no reason at all.")

[129] *Stewart*, 495 U.S. at 229 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985)).

creation of a compulsory copyright license under which cable and satellite providers could stream broadcast programming over the Internet without negotiating a license to do so with the copyright owner. Such a rule would be well beyond the Commission's limited authority and contrary to congressional intent. In short, broadcast stations control distribution of their copyright-protected programming. The Commission cannot override or undermine that unqualified statutory right by (re)defining the parameters of "good faith negotiation" to foreclose its exercise in the course of retransmission consent negotiations.

A rule prohibiting broadcasters from withdrawing online access to their signals during retrans disputes would withdraw from stations a perfectly appropriate tool available to broadcasters engaged in negotiating the terms and conditions on which they will consent to the retransmission of their signals, unfairly placing a thumb on the scale in favor of MVPDs during negotiations by effectively requiring stations to "bundle" broadcast and online rights at an MVPD's request.[130] (At the same time, the *Notice* proposes to treat a broadcaster's request to "bundle" channels as indicative of bad faith—a result that would be exceedingly arbitrary and unfair.) The *Notice* asks, rhetorically, how "using this online practice as a tactic to gain negotiation leverage" is "more egregious or harmful to consumers than other practices used to gain leverage in retransmission consent discussions."[131] The answer is simple: It is not.

Plainly, broadcast stations have the right to control the online distribution of their programming; they must remain free to exercise (or bargain for limitations on) that right during

[130] In other proceedings, commenters have described both the propriety of stations' blocking of online access during retrans negotiations and the practical difficulties in identifying an MVPD's video service subscribers in order to achieve more targeted blocking. *See Notice*, ¶ 13 n.56.

[131] *Notice*, ¶ 13.

retransmission consent negotiations just as they do with respect to every other substantive term of a retransmission consent agreement. MVPDs should not be permitted to *demand* online distribution rights as a condition of distribution by cable or satellite—and an MVPD's demand to tie distribution by means of traditional MVPD facilities to online distribution rights should, if anything, be considered indicative of bad faith (particularly because broadcast stations may not even have the rights to authorize the online distribution of all programming contained in their signals). MVPDs make online access to programming an additional service available for purchase by their subscribers. The broadcast stations that incur the platform and programming costs to obtain and deliver online services have an equal right to compensation from MVPDs. Online access to programming is one of the many items that should be subject to arm's-length retransmission consent negotiations, not something that broadcast stations can or should be compelled to give away to MVPDs, any more than MVPDs should be required by government regulation to "give away" any of their service offerings. To the extent the Commission considers online distribution rights "a critical factor in . . . retransmission consent negotiations,"[132] it is all the more reason to allow broadcasters and MVPDs to negotiate for those rights in the marketplace free of Commission interference.

Finally, no rule compelling broadcast stations to make programming available online to a particular MVPD's subscribers during a retransmission consent dispute is necessary. Even in a retrans impasse, viewers are not "harmed" because the MVPD's subscribers are not left without the ability to access the station's signal. Viewers can always obtain the station's signal free over-

[132] *Notice*, ¶ 19.

the-air during an impasse with a particular MVPD, or subscribe to another MVPD service.[133] There is ample evidence that consumers have choices, among them to subscribe to an MVPD or to "cut the cord" and watch over-the-air signals.[134] Competitive market forces are, indeed, working, without government intervention.

8. The totality of the circumstances test must be fully reciprocal.

The *Notice*—and particularly the list of questions raised in ¶ 16—focuses overwhelmingly on behavior by broadcasters, not by MVPDs. The assumption underlying many of the questions raised in the *Notice* is that broadcasters in particular fail to abide by the good faith negotiation requirement. That (mistaken) assumption is contrary to the entire gist of the *Reciprocity Order*[135]

[133] The *Notice* acknowledges as much. *See Notice,* ¶ 13; *see also*, *e.g.*, Reply Comments of the ABC Television Affiliates Association, MB Docket No. 10-71, at 2 (observing that "each local television broadcast station—even during a short, interim disruption of service from a retransmission consent negotiation impasse—is always accessible and always available from at least three—in some cases, four—alternative sources."). Affected subscribers could also obtain the station's programming from other MVPDs in the market, although subscribers' ability to switch MVPDs to obtain desired programming is constrained, often significantly, by onerous termination provisions in MVPD agreements. The *Notice* points to the "increase in competition among MVPDs" in recent years as a factor contributing to broadcast stations' increased leverage in retransmission consent negotiations and notes that "an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs." *Notice*, ¶ 3. Of course, as the *Notice* further observes, "early termination fees imposed by some MVPDs may make it difficult for consumers faced with a potential retransmission consent negotiating impasse to switch to another MVPD in order to maintain access to a particular broadcast station." *Id.* (citing *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727, n.50 (2011)); *see also* NAB Retrans Comments, MB Docket No. 10-71, at 13-15 (discussing MVPDs' use of early termination fees "as a tool to hold their subscribers 'hostage' during a retransmission consent impasse").

[134] *See, e.g.*, "Pay-TV Subscribers Abandoning Ship," Radio & Television Business Report (Oct. 21, 2015), available at http://rbr.com/pay-tv-subscribers-abandoning-ship (last visited Dec. 1, 2015).

[135] *See Reciprocal Bargaining Order*, 20 FCC Rcd at 10339, ¶ 1 (extending to MVPDs "the existing good faith bargaining obligation imposed on broadcasters"); *id.* at 10344, ¶ 13 (amending "existing [good faith] rules to apply equally to both broadcasters and MVPDs").

and the (small) body of Commission decisions resolving good faith complaints—in which the Commission has found one MVPD to have engaged in bad faith negotiation but has never found a single broadcaster to have done so.[136]

It is troubling that the *Notice* even questions whether the good faith retransmission consent rules, and any modifications made to those rules, apply equally to both broadcasters and MVPDs.[137] The Affiliates Associations, therefore, endorse the Commission's proposal that "any practices that we find to be indicative of bad faith under the totality of the circumstances test" should "apply to both broadcasters and MVPDs (to the extent such practices are engaged in by both broadcasters and MVPDs)."[138] Any other result would favor certain competitors in the retransmission consent marketplace rather than the principles of robust competition that Congress plainly intended to govern retransmission consent negotiations.

---

[136] *See* n.43, *supra*.

[137] *Notice*, ¶ 18.

[138] *Notice*, ¶ 18. The Affiliates Associations agree, of course, that certain negotiating practices can, as a practical matter, be attributed only to broadcasters (or to MVPDs), such as "demanding that an MVPD place limits on its subscribers' use of lawful devices and functionalities." *Id*. n.98. The Affiliates Associations believe that evenhanded application of the Commission's adaptable and fact-specific "totality of the circumstances" test will be adequate to identify bad faith negotiation by both MVPDs or broadcasters on the facts of individual negotiations and that the Commission need not identify certain practices that should be deemed bad faith only when engaged in by MVPDs or by broadcasters. *Id.*

Conclusion

For the foregoing reasons, the Affiliates Associations respectfully urge the Commission to refrain from adopting changes to its "totality of the circumstances" test for determining whether broadcasters and MVPDs have satisfied their obligation to negotiate retransmission consent in good faith.

Respectfully submitted,

ABC TELEVISION AFFILIATES ASSOCIATION
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION
FBC TELEVISION AFFILIATES ASSOCIATION
NBC TELEVISION AFFILIATES

/s/
Wade H. Hargrove
Mark J. Prak
David Kushner
Julia C. Ambrose
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wells Fargo Capitol Center, Suite 1600
Raleigh, N.C. 27601
Telephone: (919) 839-0300

Counsel for the ABC Television Affiliates Association and the NBC Television Affiliates

/s/
John Feore
Cooley LLP
1299 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
Telephone: (202) 842-7800

Counsel for the CBS Television Network Affiliates Association and the FBC Television Affiliates Association

December 1, 2015